Author:
Jang, Hye-Lim

Title:
Private Enforcement of Competition Law : devising the best rules and procedures for Korea in the right of experience in the US, EU and UK

Private Enforcement of Competition Law: devising the best rules and procedures for Korea in the right of experience in the US, EU and UK

Hye-Lim Jang

A dissertation submitted to the University of Bristol in accordance with the requirement of the degree of Doctor of Philosophy in the Faculty of Social Sciences and Law. School of law, December 2009

Abstract

This thesis deals with the issue of what would be the best rules and procedures that Korea could adopt in respect of the private enforcement of competition law, in particular in respect of actions for damages. Its central objective is to analyze how private enforcement could achieve the objectives of competition law such as ensuring competition and protecting consumer interests effectively. In achieving objectives of competition law, optimal enforcement through effective and efficient combination of private and public enforcement is important because it could ensure the most effective distribution of resources between private and public enforcement.

In respect of private competition enforcement, Korea wishes to encourage and facilitate private enforcement. However, there is a high possibility that many problems arise over the private enforcement of competition law. The problems include the issues of standing; criteria and measurement of damage; passing on defense; indirect purchaser actions; class and representative actions; and the possible impact of private actions on public enforcement.

This thesis explores the issue of the best solution to some of the most important of these issues for Korea in the context of four pervasive themes i) the objectives of competition law ii) the legal and competition law culture of Korea, iii) the relationship between public and private enforcement and iv) the experience of certain other jurisdictions (the US, the EU, and the UK). The analysis takes into account these three comparator jurisdictions for the following reasons. The US has the most mature and long-established system of competition law in the world. The EU is at a particularly interesting stage as regards private enforcement as the European Commission is actively seeking to promote it. The UK is a Member State of the EU and it is therefore useful to look at the UK as a jurisdiction in which the EU rules are actually applied. The final conclusion reached by the analysis of these three jurisdictions.

Author's Declaration

I declare that the work in this thesis was carried out in accordance with the Regulation of the University of Bristol. The work is original except where indicated by the special reference in the text and no part of the thesis has been submitted for any other academic award. Any views expressed in the dissertation are those of the author, except where indicated otherwise.

Signed: *Hye-Lim Jang* Date: 2009.12

Acknowledgement

This thesis has been long in the making. I am deeply grateful to my supervisor, Professor Brenda Sufrin for her patience, help, encouragement and excellent advice. I valued our discussions. She has always been very helpful in pointing me in the right direction when I could not see the wood form the trees. This thesis would not have been possible without Brenda.

I would also like to express my love and gratitude to my family, my parents and my sisters and brother. They have always supported and encouraged me to finish this thesis. I would also like to thank all my friends, especially in Bristol, for their patience and kindness.

I was also helped and encouraged by other members of staff in the School of Law, and by the staff of Wills Memorial Library for awkward requests. Finally, the school of Law itself was very good in providing an excellent working environment and efficient administration.

Table of Contents

Chapter 1. Introduction

1.1 Introduction to the Thesis

1.1.1 General Explanation of this Thesis

This thesis addresses the research question of what would be the best rules and procedures that Korea could adopt on certain major issues in respect of the private enforcement of competition law, in particular actions for damages.

The thesis explores this question in the context of the approach to these issues in three jurisdictions in which private damages actions are well-established or have been the subject of recent discussion and proposals for reform, in order to see what lessons and insights can be derived from them. The issues are considered in the light of four pervasive themes i) the objectives of competition law ii) the legal and competition law culture of Korea iii) the relationship between public and private enforcement and iv) the experience of certain other jurisdictions (the US, the EU, and the UK).

1.1.1.1 What is the present position as regards damages actions in Korea?

Until now the enforcement of competition law in Korea has been heavily concentrated on 'public enforcement' that is, enforcement by an agency of the state. In this, Korea is similar to the great majority of jurisdictions throughout the world, with the noted exception of the US. Although the methods of the public enforcement of competition law vary considerably between jurisdictions, it generally features monetary penalties that take the form of fines that go to the public purse rather than to parties that have suffered damage as a result of an infringement, and is characterized by a lack of control of the proceedings by private parties such as competitors and customers. In contrast, private enforcement can basically be described as litigation initiated by a private party.[1] Private enforcement has hitherto been limited in Korea, with 90% of competition

[1] This could include taking a matter to arbitration as well as court proceedings.

enforcement being public enforcement. There are two major reasons for this. First, Korea is not a litigious society and the business culture militates against private litigation, as explained in Chapter 2. Second, the Korean legal system lacks many of the devices which provide strong incentives for plaintiffs to bring actions, such as multiple damages,[2] one-way costs rules,[3] contingency fees[4], broad discovery procedures[5] and opt-out class actions.[6] These incentives can encourage private enforcement although, as is seen in this thesis, they can also cause problems. This is shown by the position in the US, where plaintiff incentives have led to abuse of litigation, as explained later in this thesis. However, Korea has recently been encouraging and facilitating the private enforcement of competition law particularly actions for damages, and one question to consider is whether certain US procedures could be transplanted to Korea without the problems experienced in the US occurring. It is possible that features of Korean culture might prevent problems such as abuse of litigation. On the other hand it may be that these strong incentives are not be consistent with Korean legal tradition so that transplantation is not feasible.

1.1.1.2. Why should private enforcement be encouraged?

In trying to encourage damages actions Korea is like many other jurisdictions such as the EU where, although the competition law regime is set up primarily as a system of public enforcement, a great deal of attention is currently being paid to private enforcement, particularly actions for damages. The issue of why states[7] wish to encourage and facilitate private enforcement is one of the matters discussed in this thesis. It can be said by way of introduction, however, that it is closely bound up with the reasons for which states adopt competition laws and with the objectives

---

[2] Treble damages, for example, allow the plaintiff to recover three times the amount of damags actually suffered as a result of the anticompetitive conduct, see further Chapter 3.
[3] The one-way cost rule is that plaintiffs can get their costs if they win the action but are not required to pay the defendants' cost if the action is successfully defended.
[4] Contigency fee means that winning plaintiffs' lawyer has an entitlement to fees which are calculated in relation to the size of the award.
[5] Under the law of the United States, for example, civil discovery is wide–ranging and can involve any material which is relevant to the case except information which is privileged.
[6] Opt-out class actions means the class member is bound by the resolution of the class actions unless the class member chooses to opt out of the class, see further Chapter 6.
[7] In this thesis, unless the context otherwise requires 'state' includes the EU.

of those laws such as consumer welfare. This means that the enforcement of competition law is concerned with public goals and not only, or even mainly, with private rights. Private enforcement can therefore serve two ends. First, it can support, complement and supplement public enforcement by providing extra deterrence to infringements of the competition rules and can help to remedy the inability of public enforcement agencies to pursue all infringements, because of lack of resources for example. Secondly, it can uphold the private rights protected by competition law. Damages actions are important in this regard because individuals can get compensation only through litigation. Fines imposed by public enforcers do not compensate the victims of infringers. For instance, there can be damages claims by a direct or indirect purchaser from a member of a price fixing cartel or damages claims brought by a co-contractor to a vertical agreement. The latter has occurred in Korea, as discussed in Chapter 3.[8]

Throughout this thesis reference is made to the 'optimal enforcement' of competition law. It is necessary to consider how competition law can be effectively enforced to achieve optimal enforcement against conduct that causes a welfare loss to society.[9] To ensure optimal balance between private and public enforcement, it is desirable that private enforcement and public enforcement work alongside each other to the best effect. Although the encouragement of private enforcement is desirable, it cannot alone achieve the objectives of competition law enforcement. Rather, there needs to be mutually fruitful interaction between private and public enforcement. Private enforcement must not alter the basic goal of the competition rules, which in Korea is to safeguard the public interest in maintaining free and undistorted competition.[10] Thus, it is necessary for private enforcement to be evaluated in terms of how successfully it helps to advance the public interest without unreasonably deterring legitimate business. The concept of optimal enforcement will be explored more fully in the later chapters but as way of introduction it can be taken to mean the way, or combination of ways, of enforcing competition law which best promote the objectives of that law.

---

[8] See section 3.2.1 which deals with the principle of compensation for damages in Korea.
[9] In respect to consumer welfare, see section 1.2.2.1 which deals with the objectives of competition law in Korea.
[10] See section 1.2.2.1 which deals with the objectives of competition law in Korea.

1.1.1.3 What are the main issues in private damages actions?

Many problems arise over the private enforcement of competition law, in all jurisdictions. Some of these are shared by litigation in other areas of law but some are peculiar to, or peculiarly difficult in respect of, competition law. They are especially acute in the area of damages actions. The problems include the issues of who should be able to sue; what type of damages should be awarded; the quantification of damages; the passing on defence; procedures, such as group actions, necessary to encourage individual victims to sue; costs rules; discovery rules; and the possible impact of private actions on public enforcement.

It is impossible within the word constraints of this thesis to examine all these matters and therefore this thesis concentrates on considering the best rules for Korea to adopt in respect of four main issues: (i) the type of damages to be awarded (ii) whether or not a passing on defence should be recognised (iii) whether indirect purchasers should have standing to sue and (iv) group or representative actions.

These matters have been chosen because they are of fundamental importance and raise issues of principle. The type of damages awarded involves a consideration of whether the basis should be compensation or something else, which in turn necessitates considering what is the function of damages actions. The passing on defence is related to the compensation question and raises the question of whether the desire to deter infringements by giving those most likely to sue the right to do so outweighs the conceptual difficulty of rewarding those who have not suffered loss. The indirect purchaser question is related to the passing on defence and who should be able to sue, and again raises the question of whether damages actions protect private rights or are merely a mechanism for bolstering the public interest. The group action question deals with one of the most intractable problems in damages actions, namely how to encourage such actions where the losses suffered may be widely dispersed and spread thinly over very many individuals, in other words how to enhance consumer welfare by ensuring effective actions for consumers. The thesis does not discuss jury trials because Korea does not have a jury system and,

given the civil law system of Korea, there is no likelihood of one being adopted. The problems of multiple enforcement by state and federal authorities in the US are not discussed because this multiple enforcement is restricted to the US and has no relevance for Korea.

1.1.1.4 What lessons can be drawn from other jurisdictions?

As private damages actions already exist to a greater or lesser extent in many other jurisdictions it is useful for Korea to examine the experience of other jurisdictions. Indeed, the efforts to encourage private damages actions in Korea will in a large part be an exercise in choosing whether to embrace, modify, or reject key aspects of competition litigation as it is practised in other jurisdictions. This thesis has chosen to look in particular at what Korea can learn from the US, EU, and UK. These three comparator jurisdictions have been chosen for the following reasons.

1. The US has been chosen since the US has the most mature and long-established system of competition law (called in the US 'antitrust') in the world, originating in the Sherman Act of 1890. However, there are many differences between the Korean legal system and the US legal system. Most crucially, the main difference between these two systems in the area of competition law is what is the primary enforcement mechanism. On the one hand, the US is exceptional in that private enforcement is the predominant way in which antitrust law is enforced. On the other hand, competition enforcement in Korea has been primarily entrusted to a powerful public authority which not only prosecutes infringers but is a decision-making body. Despite these substantial differences, it is impossible to discuss the issues raised in this thesis without reference to the American experience. With more than a century's experience of a private enforcement regime, the US is a valuable source of useful positive as well as negative policy lessons for private enforcement for Korea. The US experience of private enforcement shows that it is important to balance the facilitating of private competition enforcement against preventing the waste of resources that result from baseless lawsuits. It shows that it is desirable to strike a balance between the encouragement of private enforcement and the prevention of litigation abuse by considering the good and bad effects of strong

incentives in order to ensure effective private damages actions in Korea.

2. The EU has been chosen since the European Commission is actively seeking to promote private enforcement despite the predominance of public enforcement. The EU has now had a system of competition law for nearly fifty years.[11] During that time the predominant method of enforcement has been public enforcement by the European Commission. Private enforcement in the EU is a far more complex issue than in a national state such as Korea or the US. This is because private actions in the EU have to be brought in the national courts of the Member States. It is not possible for private parties to litigate between themselves in the European Court of Justice (ECJ) or the Court of First Instance (CFI).[12] However, on some issues an EU-wide rule has been laid down by the ECJ. On other issues the position may vary widely from Member State to Member State. However, the EU is at a particularly interesting stage as regards private enforcement at present as the European Commission is actively seeking to promote it. To this end it is attempting to harmonise the laws and procedures of the Member States on matters relevant to damages actions for breach of the competition rules and to achieve the optimum relationship between public and private enforcement.[13] Developments and discussions at EU level are therefore highly instructive in any consideration of the best rules to adopt on private damages actions.

3. The UK has been chosen because although UK domestic competition laws are predominantly enforced by public competition authorities, the UK has tried to encourage private enforcement and has adopted various procedures for facilitating private enforcement. Also, the UK is a Member State of the EU and accordingly must adopt and follow rules in respect of private enforcement laid down by the ECJ or required by European legislation. It is therefore useful to look at the UK as a jurisdiction in which the EU rules are actually applied. Further, an increasing number of damages actions are coming before the UK courts and important

---

[11] Competition law in the EU is EC rather than EU law until the Treaty of Lisbon comes into force.
[12] Disputes between private parties only reach the ECJ on a reference from a national court under Article 234 and return to the national court for a judgment in the case. See further section 2.2 which deals with overview of private enforcement in the EU.
[13] The Green and White Papers of the European Commission on actions for damages are discussed further at section 2.2 which deals with overview of private enforcement in the EU.

principles have been laid down in a number of judgments. The UK is an interesting jurisdiction because, like the US but unlike Korea, it is a common law country but it does not have the same 'litigation culture' as the US and opted for a system of primarily public rather than private enforcement. From Korea's perspective, therefore, the UK can be seen as a bridge between the common and civil law worlds.

1.1.2 Outline and Structure of this Thesis

The thesis consists of this Introduction and six further Chapters.

Chapter1.

This chapter explains that the primary issue is the role of private enforcement in achieving the optimal enforcement of competition law. The EU, UK and Korea have recently engaged in reviews on how to improve conditions for the private enforcement of competition law. As I will discuss below,[14] the key question is how to achieve optimal enforcement through effective and efficient combination between private and public enforcement.

First, I discuss the objectives of competition law in the Korea, the EU, UK, and US. It must be noted that the UK is part of the EU and the UK legal system is part of the EU legal order. I also discuss the objectives of enforcement. The objectives of competition law should be distinguished from the objectives of competition law enforcement because the instrumental role of private and public enforcement must not be confused with the objectives of competition law itself.[15] Thus, in Chapter 1 I discuss the objectives of private competition enforcement separately from the objective of competition law but then examine how they relate to each other. Second, I discuss the importance and benefit of the private enforcement of competition law. Third, I discuss the relationship between private and public enforcement. The fundamental issue is how to strike the right balance between public enforcers' policy goals in pursuing the public interest and private parties' goals in pursuing their own interests, insofar as these conflict.

---

[14] See section 1.4.4 which deals with optimal enforcement with public and private enforcement.
[15] Assimakis P. Komminos, "Public and Private Antitrust Enforcement in Europe: Complement? Overlap?", Competition Law Review, Volume 3, 2006, p. 14.

Fourth, I discuss optimal enforcement and the roles of private and public enforcement in achieving it. Namely, what constitutes optimal competition law enforcement and how can it be achieved through effective and efficient combination of public and private enforcement? To achieve optimal enforcement, it is important to strike a right balance between private interests and public interests by coordinating them in an optimal way to achieve the highest probable compensation and effective deterrence.[16] Thus, I discuss the relationship between private and public enforcement to achieve optimal enforcement because optimal enforcement could be achieved through creating an effective system of private enforcement as a complement to, and not a substitute for, public enforcement.

Chapter 2.

The second chapter is the 'Overview of EU, UK, US and Korean competition law'. This chapter is important because the EU, UK, US and Korean jurisdictions are different from each other. To ensure optimal enforcement through effective and efficient combination of private and public enforcement, it is necessary to understand the general competition laws and legal systems of the EU, UK, US and Korea. Thus, I explain the general characteristics of competition law of the EU, UK, US and Korea and also of the respective legal system insofar as these are relevant in this context.

First, I discuss the importance of competition in Korea. I introduce Korean competition culture and the development and importance of competitive industry in Korea. In the last forty years, Korea has developed a competition culture, which has contributed to its sound and strong economy. In respect to this competition culture and competitive industry, I discuss competition law system and current private and public enforcement systems.

In respect to public competition enforcement system, I discuss the characteristics and role of the public competition authority, the Korea Fair Trade Commission (hereafter, KFTC) because without judicial involvement, the KFTC has exclusive jurisdiction over the competition law.[17] I then discuss the private competition enforcement system in Korea. I explain the organization and

---

[16] Jürgen Basedow, "Private Enforcement of EC Competition Law", Kluwer Law, 2007, p. 17.
[17] Government Organization Law 3.

functioning of the courts in Korea since to be compensated for damages, private parties should bring damages actions of Competition Law before courts. Although plaintiffs can bring damages actions before district courts without the decision of the KFTC since 2004 when the provision of damages actions was revised[18] I explain that Korean culture is a disincentive to such private claims.

Second, I introduce private enforcement in the EU. Private enforcement of competition rules has been underdeveloped in the EU. It has played no significant role so far, although at least in some Member States that is beginning to change. In the EU the central role has always been given to public enforcement. It must be noted that in the EU private enforcement takes place in the courts of the Member States. However, the European Commission has regarded it as necessary to reform its system of competition law enforcement because there is a general recognition that public enforcement by the Commission and the National Competition Authorities (hereafter, NCAs) should be supplemented by private enforcement. Thus, there have been efforts to encourage private enforcement in the field of competition law. To ensure private enforcement, the Commission adopted Regulation 1/2003 and published the White Paper setting out its proposals for improving the legal conditions for victims to exercise their right to bring actions for all damage suffered as a result of a breach of the EC competition rules.[19] The Commission's White Paper is important because its proposals may lead to EU legislation aimed at harmonizing relevant national laws in the Member States.

Third, I discuss private enforcement in the UK. I explain the development of competition law in the UK, including the changes to the competition rules such as the Competition Act 1998 and the Enterprise Act 2002.

Fourth, I introduce private antitrust enforcement in the US. The US has a long history of antitrust law and its private enforcement. Private enforcement has been overwhelmingly the most common form of antitrust litigation in the US.[20]

---

[18] Before the revision of this provision, plaintiff can bring damages action before court with the only decision of infringement of competition law of the KFTC.

[19] European Commission, White Paper on Damages actions for breach of the EC antitrust rules, Com (2008) 165 final, 2008 and Commission Staff Working Paper accompanying the White Paper.

[20] Charles E. Koob, David E. Vann, Jr. And Armany Y. Oruc, "Developments in Private Enforcement of Competition Laws: Introduction", Simpson Thacheer & Bartlett LLP., 2004, p.1; Katherine Holmes, "Public Enforcement or Private Enforcement? Enforcement of Competition Law in the EC and UK", E.C.L.R. 2004, 25(1), p. 25.

The US antitrust enforcement scheme seems almost exclusively litigation oriented and dependent on mainly private parties to secure compensation, deterrence, punishment and disgorgement of illegal conduct.[21] Thus, I introduce the basis, the number of private actions and the rationale of having strong incentives to encourage private enforcement. I also discuss the characteristics of private enforcement such as the antitrust injury rule and other features of private actions.

The US legal system has many good mechanisms to ensure efficient litigation such as simplified notice pleading in *Twombly*[22] and summary judgment. Simplified notice pleading standard of the Federal Rules[23] relies on summary judgment motions to define disputed facts and issues and to dispose of unmeritous claims.[24] Despite these effective mechanisms of US legal system, the right of private action has been a critical, yet persistently controversial feature of US antitrust law because there are extraordinary opportunities for abuse that can ultimately overwhelm the benefits.

Chapter 3

Chapter 3 is about what type of damages can or should be awarded in competition cases. In Korean law the usual principle in awarding damages is to compensate for the loss suffered. The question is whether this principle should be applied in cases concerning infringement of the competition rules. The type of damages awarded is important in the encouragement of private enforcement because it can influence incentives to bring damages action. The plaintiff's incentive to bring actions depends on the scope of damages and on the amount of compensation he can obtain.[25] The more harm that is included in the scope of the claim and the more possible it is to obtain damages, the more probable it is that litigation will happen in the first place. Thus, it is necessary to consider the

---

[21] See Federal Judicial Caseload Statistics, Table C-2: U.S. District Courts--Civil Cases Commenced, by Basis of Jurisdiction and Nature of Suit, During 12-Month Period Ending March 31, 2002, available at http:// www.uscourts.gov/caseload2002/tables/c02mar02.pdf (last visited Mar. 2, 2004); Clifford A. Jones, "Private Enforcement of Antitrust Law in the EU, UK and US", Oxford, 1999, p.19.

[22] *Bell Atlantic Corp. v. Twombly*, 127 S. Ct. 1955, 1974(2007).

[23] Federal Rules 8(a)(2)

[24] *Swierkiewicz*, 534 U.S., at 511, 122 S.Ct, 992.

[25] Michael Harker&Morten Hviid,"Competition Law Enforcement and Incentives for Revelation of Private Information", 31(2) World Competition 279, 2008, p. 292.

incentive side of the amount of damages.[26] Also, damages at an appropriate level can induce potential infringers to refrain from illegal conduct because effective damages actions can be a tool to increase private parties' motivation to detect and prosecute illegal activities. Therefore, in this chapter, I carry out a comparative analysis of the principles applied in the EU, UK, US and Korea. Above all, I discuss whether Korea should recognize exemplary, restitutionary or multiple damages such as treble damages.

First, I discuss two characteristics of damages for anticompetitive conduct such as i) any possible differences between tort damage and competition damage, and ii) the infringer's financial gain from anticompetitive conduct. I define competitive damage based on these two characteristics.

Second, I discuss what kind of anticompetitive damage could be compensated. If compensable anticompetitive damage exists, the key question is what the criterion of damage is. I discuss whether anticompetitive damage should be compensated under the principle of compensation for loss or the principle of restitution of the illegal gains. Restitutionalry damage which has gain-based compensation is different from tort damage because tort damages are based on compensation for loss. I also discuss whether damages should include some punitive element as well as a compensatory element. As far as compensatory, exemplary or restitutionary elements are concerned, it is necessary to consider the general rules of damages actions under tort law (or civil law as it is known in Korea, hereafter tort law) because fundamental principles of damages actions under tort law could be applied to damages actions under competition law.

Thus, this Chapter explains the principle of damages actions under tort law. I discuss the attitudes of Korea, the EU and UK toward compensatory, exemplary and restitutionary damages. In respect of the amount of damages to be awarded, I discuss a number of crucial Korean cases.

I then discuss the attitudes of US toward multiple damages such as treble damages. Currently, the US is the only country where treble damages can be awarded. I therefore describe treble damages actions in the US and discuss the rationale of treble damages in terms of compensation, deterrence, punishment and disgorgement of illegal gains. I also deal with the problems created by treble

---

[26] Jürgen Basedow, supra note 16, p. 13.

damages awards. I consider the arguments that although treble damages can be a strong incentive to encourage damages actions, they can also lead to the abuse of the of the litigation process.

Third, I discuss whether Korea needs to recognize exemplary, restitutionary or multiple damages such as treble damages to ensure effective and efficient private enforcement. It can be argued that it is desirable for Korea to allow more than single damages in cases of the most serious anticompetitive infringements such as cartel because exemplary, restitutionary or multiple damages can create a strong incentive for plaintiffs to bring damages actions. I consider, however, the argument that the compensatory nature of damage actions in Korea conflicts with the idea of exemplary, restitutionary or multiple damages. In addition, I argue that competition authorities are better suited than private parties to safeguard the public interest through deterrence, punishment or disgorgement of illegal gain since the results achieved by individuals in their own interest are not necessarily aligned with public interests.[27]

Chapter 4.

Chapter 4 deals with the passing on defence. The passing on defence is where a defendant denies liability on the basis that the plaintiff has passed on the illegal overcharge to his own customers. The passing on defence is important because it can affect a private party's incentive to bring actions by influencing on the amount of damages which can be obtained. If the passing on defence is permitted the amount of damages that direct purchasers can recover may be decreased, whereas indirect purchasers may be able to get compensation for the amount of damage they suffered. However, if the passing on defence is not allowed the amount of damages of direct purchasers can recover may be greater, but indirect purchasers may not get compensation at all. Therefore, I discuss the five major issues below.

First, I define and explain the importance of the passing on defence. I also discuss the problems which are created if the passing on defence is allowed.

Second, I discuss the US law on the passing on defence as established in the

---

[27] See section 3.2.5 which deals with the problems of mandatory treble damages and the desirability or otherwise of introducing them in other Jurisdictions.

Hanover Shoe, Inc. v. United Shoe Machinery Corp [28] case. The reason for dealing with the US ahead of the other jurisdictions is that the US has particularly striking rules on the passing on defence, embodied in the *Hanover Shoe* case.[29] In the *Hanover Shoe* case, the US Supreme Court rejected the use of the passing on defence. Thus, an antitrust infringer cannot avoid liability to a direct purchaser by showing that the direct purchaser suffered no injury because it passed on any overcharge to its own customers. I consider the three primary rationales of *Hanover Shoe*: ensuring effective deterrence, avoiding complexity and uncertainty, and encouraging damages actions.

Third, I discuss the present position of the passing on defence in Korea. The key question is whether Korea should follow judgment of *Hanover Shoe* in order to encourage the private enforcement of competition law. This is part of the whole question of whether Korea should consider changing its legal system in some respects in order to introduce private enforcement rules more like those of the US. In considering any change, it is necessary to consider the differences between Korean legal system and the US legal system in respect of matters such as costs rules, class actions and treble damages and way that competition law is enforced. After discussing the position in the US, I look at the position in Korea, the EU and the UK before concluding whether or not Korea should consider changing its present stance on the issue. Therefore, I discuss the rationale of permitting passing on defence under the general principles of damages actions in Korea and compare it with the US position on the defence.

Fourth, I discuss passing on defence in the context of EU law in particular in the light of the principles of effectiveness and equivalence. I also discuss whether applying general principles of tort law to competition law is possible by means of comparative analysis of tax and competition law cases. The EU is composed of 27 Member States and the substantive and procedural principles of damages actions are governed by the national laws of those Member States. Therefore, I look at the proposals on the Commission about a passing on defence in the White Paper of April 2008 which may lead to legislation in Member States of the EU.[30]

Fifth, I discuss the passing on defence in the UK. I consider the rationale of

---

[28] *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*, 392 U.S 481(1968).
[29] Ibid. at 494 .
[30] White Paper on Damages actions, supra note 19, at section 2.2.

permitting the passing on defence such as i) the compensatory nature of damages and ii) the prohibition of overcompensation as it is applied in the *Devenish* case.[31]

Chapter 5

In this chapter, I discuss indirect purchaser actions. The issues of an indirect purchasers' standing and the passing on defence which is discussed in Chapter 4 are closely related to each other. If indirect purchaser actions are allowed and the passing on defence is not allowed, multiple liabilities can arise. Determining when and where indirect purchasers may bring actions for damages can cause difficult questions of fairness and efficiency.[32] Indirect actions are important for ensuring fairness of private enforcement because if indirect purchaser actions are not allowed, many potential plaintiffs are not able to exercise their rights under competition law. Furthermore, deciding whether or not to permit indirect purchasers to bring actions raises questions regarding over- or under- enforcement of competition law and the proper relationship between private and public enforcement in achieving optimal enforcement. Therefore, I discuss the five major issues below.

First, I define indirect purchaser actions. I explain the importance of indirect purchaser actions for consumer interests because many indirect purchasers are consumers in the sense of private end users. I also discuss the relationship of the passing on defence and indirect purchaser actions because of the close relationship between the two. I then describe indirect purchaser actions in the US, Korea, EU and UK.

Second, I discuss the position in respect of indirect purchaser actions in the US, in particular the *Illinois Brick Co. v. State of Illinois* case.[33] The reason for dealing with the US ahead of the other jurisdictions is that the US has particularly striking rules on the indirect purchaser actions, embodied in the *Illinois Brick* case. In this case, the US Supreme Court held that indirect purchasers are not entitled to recover damage suffered as a result of an infringement of federal antitrust law. In

---

[31] *Devenish Nutrition Limited v. Sanofi-Aventis SA(France) and others*, Case A3/2008/0080, [2008]EWCA Civ 1086.

[32] Firat Cengiz, "Passing on Defense and Indirect Purchaser Standing in Actions for Damages against the Violations of Competition Law: what can the EC learn from the US"?,CCP Working Paper 07-21, 2007, p.13.

[33] *Illinois Brick Co. v. State of Illinois*, 431 U.S. 720 (1977)

respect to this case, I discuss the US position on indirect purchasers established in *Illinois Brick*. The problems are i) multiple liabilities, ii) inconsistent and uncertain enforcement, iii) significant injustice, iv) incorrect presumptions of passed on damages and capacity of calculation and v) conflict with ensuring consumer interests.

Third, I discuss indirect purchasers' actions in Korea. The key question is whether Korea should follow the indirect purchaser principle established in *Illinois Brick* to ensure effective deterrence. In considering this it is necessary, again, to consider the differences between the Korean legal system and the US legal system. I discuss here the reasons for permitting indirect purchaser actions in Korea such as i) full effectiveness, ii) protecting consumers' interests, iii) the prohibition of unjust enrichment and iv) ensuring efficient and effective enforcement.

Fourth, I discuss indirect purchaser's actions in the EU. As in the other jurisdictions under discussion, permitting indirect purchaser actions raises problems such as the conflict between full and just compensation and effective and efficient damages actions. However, given the direct effect of Articles 81 and 82 EC and in the light of the *Crehan*[34] and *Manfredi*[35] cases and the Commission White Paper[36], it appears that the EU will allow indirect purchaser action.

Fifth, I discuss indirect purchasers' actions in the UK with particular reference to the recent case of *Devenish* in which the standing of indirect purchasers was raised.

Chapter 6. Group Actions

In this chapter, I discuss group actions such as class, representative and collective actions. Group actions are important because they could be the only way to aggregate the small and dispersed claims of private parties, especially indirect purchasers such as consumers. As far as group actions are concerned, there are critical issues to be dealt with, such as standing, management of group actions and abuse of litigation. How all of these issues are resolved will determine whether

---

[34] *Courage v Crehan*, C-452/99, [2001] ECR I-6297.
[35] *Manfredi v. Lloyd Adriatico Assicurazioni SpA*, C-295/04, [2006] ECJ, 348
[36] European Commission, "White Paper on Damages actions for breach of the EC antitrust rules", Com (2008) 165 final.

group actions result in a system that does more good than harm. As far as group actions are concerned, the US has a long history and many examples of class actions. Thus, it is desirable to compare EU, UK and Korean laws on group actions with US class actions.

Therefore, first I introduce group actions in Korea. In particular, I will discuss current consumer policy, including changes in the KFTC's consumer policy. I then discuss group actions which were first recognized on 1 January 2007. I concentrate on the general characteristics, benefits and problems of group actions, and compare Korean group actions with US class actions, especially in respect to the benefits and problems of US class actions.

Second, I discuss the EU stance on group actions and two types of collective redress mechanism considered in the White Paper. As far as Member States of the EU is concerned, given that group action can contribute to public interests such as the consumer interest through improving access to courts, it is desirable for national courts to be encouraged to use group action mechanisms at their disposal under national law in order to achieve optimal enforcement.

Third, I discuss UK consumer claims under the Competition Act 1998 and the Enterprise Act 2002. UK law is particularly interesting because it contains special provisions on consumer claims in the Competition Act 1998. The OFT, the UK competition authority, has produced a Discussion Paper about class actions and I take this into account.[37] I discuss potential problems such as i) the limited role of the Competition Appeal Tribunal (hereafter, CAT)[38] and ii) the limited role of consumer associations. I also discuss possible solutions of these problems.

Fourth, I discuss certain features of the US system. I deal with the general character and problems of US class actions both from the plaintiffs' perspective and the defendants' perspective.

Chapter 7. Conclusion

This thesis considers how private competition enforcement can contribute to

---

[37] The Office of Fair Trading (OFT), "Private Actions in Competition Law: Effective Redress for Consumes and Business", OFT916, 2007.

[38] The UK Competition Appeal Tribunal is a special tribunal with cross disciplinary expertise in law, economics, business and accountancy whose function is to hear and decide cases involving competition or economic regulatory issues. available at http://www. Catribunal.org.uk.

achieving optimal enforcement of the competition rules in Korea. To ensure these objectives, in this chapter I conclude that private enforcement must be positively encouraged since hitherto there has been only a limited private enforcement in Korea. For achieving the objectives of competition law, both public and private enforcement should be employed. However, private enforcement should work along with public enforcement, not replace it. The effective and efficient combination of private and public enforcement is important. To encourage private enforcement, it is necessary to consider the principle of compensation for damages, passing on defence, indirect purchaser actions and group actions because these issues can substantially increase or decrease private enforcement by influencing potential plaintiffs. I have reached certain conclusions about the major issues explored in the previous chapters.

1.2 The Objectives of Competition Law and Private Competition Enforcement

The question of the achievement of optimal enforcement through effective and efficient combination of private and public enforcement must be seen in the context of the more substantive question of the objectives of competition law. Therefore, I discuss in the following sections the objectives of competition law and the objectives of private competition law enforcement.

1.2.1 Introduction to Competition, Competition Law and the Rights which Competition Law Protects

1.2.1.1 The Importance of Competition

It is recognized generally that competition is a key driver for productivity-along with innovation, enterprise and investment.[39] In neo-liberal economic theory

[39] Maher M. Dabbah, "Measure the Success of a System of Competition Law: A Preliminary View" 21E.C.L.R369., 2000 p. 369-370; Mark Furse, "The Role of Competition Policy: A Survey", E.C.L.R., 1996 p. 250; Sonya Margaret Willimsky, "The Concept(s) of Competition", 1 E.C.L.R. 52, 1997, p. 54; See generally, Eleanor M. Fox, "We Protect Competition, You Protect Competitors", 26(2)World Competition 149, 2003; Irina Haracoglou, "Competition Law, Consumer Policy and the Retail Sector: the systems' relation and the effects of a strengthened consumer protection policy on competition", Competition Law Review, 2007, p. 178-179.; Neelie Kroes, "Competition must drive European

competition exists when the number of buyers and sellers, freedom of trading, and market information are sufficient to drive prices toward marginal cost.[40] Competition offers lower prices, better choices, and avoidance of wealth transfer to the power buyer and seller from individuals such as consumers[41] because in a freely competitive market, each competing business generally tries to attract consumers by cutting its prices and increasing the quality of its product or services.[42] An essential condition of a competitive market is that unreasonable and unnecessary barriers to entry do not block access to the market by new firms, new products, or new ideas.[43]

It is therefore argued that competition affects consumers' interests because robust competition is the best means to protect consumers.[44] It is claimed that strong competition regimes encourage open and dynamic markets, and drive productivity, innovation and value in consumers' interests.[45] The theory is that in competitive markets economic resources are allocated between different goods and services in exactly those quantities which reflect consumer demand, so that resources are employed in taskes where consumers value their output most.[46] This is known as *allocative efficiency*. *Productive efficiency*, which is also a benefit of competition, means that goods and service are produced at the lowest possible cost.[47] Competition may also lead to *dynamic efficiency*, which refers to the rate of innovation and technological change. The allocative efficiency and productive efficiency achieved by competition make up the overall efficiency that determines the level of consumer welfare by lowering the costs of goods and services or by

---

competitiveness in a global economy", Villa d'Este Forum, Speech/05/477, Italy, 2005, p.2; and see Chapter 2 for a discussion of the importance of competition in Korea.

[40] Herbert J. Hovenkamp, "United States Antitrust Policy in an Age of IP Expansion", Berkeley Center for Law and Technology, 2005, p.3.

[41] Warren S. Grimes, "The Sherman Act's Unintended Bias against Lilliputians: Small players' Collective Actions as a Counter to Relational Market Power", 69Antitrust Law Journal, 2001 p. 205.

[42] Edward D.Cavanagh, Antitrust Remedies Revised, 84 Oregon Law Review 147, 2005, p.187.

[43] Robert Pitofsky, "Antitrust at the Turn of the Twenty-First Century: The Matter of Remedies", 91 Geo.L.J.169, 2002, p.178.

[44] Timothy J. Muris, "Principles for a Successful Competition Agency", 72 University of Chicago Law165 Review, 2005, p.175.

[45] The Office of Fair Trading, "Private Actions in Competition Law: Effective Redress for Consumes and Business", OFT916, 2007.

[46] Robert H. Bork, "The Antitrust Paradox", Free Press, 1993, p.91

[47] Productivity efficiency therefore refers to the effective use of resources by particular firms. The idea of effective use encompasses much more than mere technical or plant-level efficiency. R. H. Bork, Ibid., p.91.

increasing the value of product service offered.[48] In markets in which there is a monopoly, however, price rises above marginal cost, and there is a loss of efficiency. Not only is some consumer surplus (the difference between the market price and the consumers' willingness to pay) transformed into producer surplus (the difference between the market price and the costs of production) but some consumer surplus is lost to the market altogether (the deadweight loss). It is worth noting at this point that Robert H. Bork's concept of consumer welfare in his book *The Antitrust Paradox* is actually what is usually called 'total' or 'social' welfare, in that he is concerned only with the loss to efficiency represented by the deadweight loss and not with the loss of consumer surplus to producer surplus.[49] In other words, he considers only the efficiency of the market, that is the sum of consumer and producer surplus, and not how that surplus is shared between producers and consumers. In this thesis, however, the term 'consumer welfare' is employed in the sense that it is normally understood, in that it can be equated with *consumer* surplus.

Allocative efficiency benefits consumers, therefore, in that it drives prices towards marginal costs. Consumer welfare is greatest when society's economic resources are allocated so that consumers are able to satisfy their wants. 'Consumer welfare' in the technical sense may be equated with consumer surplus, as noted above, but it can also be described as the state of affairs which leads to consumers benefitting from low prices, choice, quality and innovation. Competitive and customer-focused markets are the best guarantee of consumer welfare because they result in such prices, choice, quality and innovation. It can also refer to the achievement of allocative efficiency without impairing productive efficiency to the detriment of consumers.[50]

The ultimate goal of consumer welfare provides a common denominator by which gains in destruction of monopoly power can be estimated against losses in efficiency. The role of competition law is to improve allocative efficiency without impairing productive efficiency.

---

[48] R. H. Bork, Ibid., pp.7-8.
[49] Ibid., p.91.
[50] S. M. Willimsky, supra note 39, p.54.

The primary objective of competition law is to protect public interest such as fair competition and consumer welfare.[51] It is submitted that consumer welfare can be defined as the difference between what consumers are willing to pay and what they actually pay. Consumer welfare is greatest when society's economic resources are allocated so that consumers are able to satisfy their want. Lost consumer surplus should be considered because a transfer from consumers to firms does not improve social welfare. Competition may be any state of affairs in which consumer welfare cannot be increased. The role of competition law is to improve allocative efficiency without productive inefficiency which can impair consumer welfare.[52] Private competition enforcement[53] could be a method of achieving the objectives of competition law. In respect to private competition enforcement, there are a number of significant questions to address at the outset. The key question is how private enforcement could achieve the objectives of competition law effectively. It is fair to ask the broader policy question that to what extent private enforcement really needs to be promoted in Korea.

1.2.1.2 What is Competition Law?

According to a Korean authority, competition law can be defined as "a control exercised by a public competition authority over the anticompetitive activities of individuals, firms or public regulators in order to achieve defined goals such as promotion of competition or protection of consumer interests." [54] Competition law reflects the willingness of the state to intervene in economic

---

[51] In respect to fair competition see section 1.2.2.1 which deals with the objectives of competition law in Korea; In respect to consumer welfare, see section 1.2.1.1 which deals with the importance of competition and consumer welfare.

[52] Robert H. Bork, "The Antitrust Paradox", Free Press, 1993, p.7, 91.

[53] As far as 'Damages claims' and 'private enforcement' is concerned, see Paolisa Nebbia, "Damages actions for the Infringement of EC Competition Law: Compensation or Deterrence", 33 European Law Review 23, 2008, p.23. In this article, Paolisa Nebbia stated that: "Damages claims and private enforcement are two terms commonly used to designate actions brought by victims of anti-competitive conduct to recover ensuing loss. These two terms, although used interchangeably, have different connotations: the former reflects the restorative nature of such claims, while the latter highlights their deterrent effect. It is also important to point out that the notion of private enforcement includes a broader set of remedies than the right to damages, ranging from injunctive to declaratory relief."

[54] Chung Ho-Yul, "Competition Law"(2nd ed.), Parkyoungsa, 2008, pp. 59-62 : Kwon Oh-Sung, "Competition Law"(5th ed.), 2005, Bubmoonsa, pp.13-15 : Shin Hyun-Yun, "Competition Law"(2nd ed.), Bubmoonsa, 2007, pp. 11-12

activities by directing businesses to conform their practices to the achievement of a wider goal such as ensuring a competitive market where consumers can acquire good quality products for reasonable prices.[55]

Competition law is the principal regulator of commercial forces in a market and of the market players by preventing anticompetitive conduct. Competition law is based on the idea that competition is the appropriate means to control the abuse of economic power[56] and that law should be utilised to ensure that competition is not hindered in this role. For instance, in Korea the KFTC has stated that competition law has taken the role of fundamental law such as economic constitutional law to regulate and control anticompetitive practices in Korea.[57]

Competition law is relevant to anyone who has an interest related to the maintenance of the competitive market to the extent to which he (or she) can claim a specific injury deriving from the breach or the decrease of competition.[58] However, as discussed below, competition law protects public as well as private rights.

1.2.1.3 What are the Rights that Competition Law Protects?

As will be explained in the sections below, competition infringements do not require the occurrence of harm to a person. It is sufficient to impair the public interest through restricting competition. Equally, some anticompetitive conducts may cause harm to certain persons and still may not be considered anticompetitive because it may not affect competition in the market. Thus, it is necessary to consider the public aspect of competition law.

1.2.2 Objectives of Competition Law

It has been said that the main objective of competition law is to regulate the

---

[55] Shin Hyun-Yun, Ibid.
[56] Harry First, "Antitrust Law", Fundamentals of American Law 427, 1996, p.427- 432.
[57] See KFTC Annual Report 2009, 2008, p.8.
[58] Chung Ho-Yul, supra note 54, p.484.

way in which undertakings interact with each other and with their customers.[59] However, there are many different opinions about the exact goals of competition law. The main debate about the goals of competition law is between the idea that competition law is about promoting consumer welfare and the idea that it should protect competition in order to advance a wider range of public interests. These public interests can include, for example, employment, the environment, balanced economic development or the protection of national champions but can also embrace the concept of 'economic freedom'. This means that competition law should be employed to maintain the freedom of undertakings to compete on the market, which may entail, for example, protecting small competitors against larger firms. Although protecting competitors for their own sake may also promote consumer welfare it can also lead to a loss of efficiency which is contrary to consumer welfare. The school of thought that holds that the objective of competition law is the protection of economic freedom is often called 'ordoliberalism'.[60] In some jurisdictions (such as Korea) the objectives of the law are expressly set out in the competition legislation but even then they may be open to different interpretations. As far as competition authorities are concerned the current consensus around the world appears to be that the objective of competition law should be consumer welfare, but courts and governments may take a different view.

The history of competition laws shows that even within a particular jurisdiction the objectives pursued by competition law have changed over time and have been affected by developments in the economy. Therefore, it is not possible to make generalizations about the objectives of competition law in Korea, the EU, the UK and the US and in the sections below the jurisdictions discussed in this thesis are therefore treated separately.[61] However, it should be noted that the objectives of competition law mentioned in this parargraph, such as consumer welfare and economic freedom are *public* interests, not private ones. It is important to remember this when considering the role that damages actions can play in the enforcement of competition law.

---

[59] Michael Harker&Morten Hviid,"Competition Law Enforcement and Incentives for Revelation of Private Information", World Competition 31(2), 2008, p. 279.

[60] See the section on the objectives of EU law, below.

[61] See below the jurisdictions of the EU, UK and US.

1.2.2.1 The Objectives of Competition Law in Korea

As far as the objective of the Korean Competition Act is concerned, *ensuring fair competition, protecting consumer interests*[62] and the *balanced development of economy* are the most important objectives of competition law. The Korea Competition Law 1 states that :

"The purpose of this Act is to promote fair and free competition, to thereby encourage creative enterprising activities, to protect consumers, and to strive for balanced development of the national economy by preventing the abuse of Market-Dominant Positions by enterprisers and the excessive concentration of economic power, and by regulating improper concerted acts and unfair business practices."[63]

'Fair competition' is hard to define, however, it can be defined as ensuring competition by price and quality of product and preventing other factor such as politics as well as monopolization and cartel from affecting competition. 'Free competition' means there is no private or governmental anticompetitive restraints on competition. Korean commentators have stated that fair and free competition can ensure competitive markets which drive an economy's resources toward their fullest and most efficient uses, thereby providing a fundamental basis for economic development.[64] The General Director of the KFTC has specifically stated that one of the main goals of the Competition Law is to foster competition as a means of promoting consumer welfare through lower market prices, increased variety and quality of products and services.[65]

Korea legislative history shows a predominant concern for consumers.[66] In Korea, the competition law system has been established as part of an integrated

---

[62] This focus on the consumer has driven policy makers to demand that decisions and policies either *enhance consumer welfare* or *minimise consumer detriment.*

[63] This is the official English translation by the KFTC.

[64] Chung Ho-Yul, supra note 54, pp. 59-62: Shin Hyun-Yun, supra note 54, pp. 129-132

[65] Shin Yong Sun (General Director of the KFTC), "2009 Major Project of the KFTC", Journal of Competition, 2009, p.8-9.

[66] See 2008 KFTC Annual Report.

system of consumer law whose parts have different scope and functions but whose common aim is consumer welfare.[67] To achieve consumer welfare through competitive market, the KFTC has assumed responsibility over consumer policy.[68] To protect consumers' right effectively, the KFTC announced its *Consumer policy development plans* on April 16, 2007.[69] It laid the institutional groundwork for the KFTC to implement consumer policies in conjunction with competition policies, which also requires a shift of policy focus to 'creation of consumer-oriented market.' The plans completed the revision of consumer policy implementation system, based on which the KFTC works together with the Korea Consumer Agency and consumer groups.

Besides protecting consumer interests directly, one of the main goals of the Competition Law is to maximize efficiency of the market economy. Maximization of efficiency of the market economy is possible when competition policy and consumer policy are pursued in conjunction with each other. It is necessary to use the resources better and to create more efficient system capable of ensuring effective protection of the competition and consumers' interests.[70] In order to fulfill objectives of Competition Law, the Competition Law provides various regulations banning and controlling certain forms of conduct.[71]

1.2.2.2 The Objectives of Competition Law in the EU

As far as EU competition law is concerned, from its inception, the Community's competition law system has been "special."[72] It has been used to protect competition but, unlike national competition law systems, it has also served as a means of achieving the specific goal of unifying the single internal EU

---

[67] "Consumer Policy Development Measures of the KFTC", KFTC, 2007, p.1.
[68] Consumer Fundamental Law 21
[69] KFTC Annual Report 2008, p.312.
[70] Competition Law 1 (Purpose of Competition Law)
[71] For example, there are many regulations such as Guideline for reviewing the abuse of market dominant positions, Guideline for Review M&A, M&A Notification Guidelines, Guideline for Review cartel, The Guideline for Review Unfair Trade Practice, Guideline for review of resale price Maintenance, Notification on the types of and criteria for unfair business practices relating to the offering of gifts.
[72] With respect to the Community's competition law system, see generally, David J. Gerber, "The Transformation of European Community Competition Law?", 35 Harvard International Law Journal 97, 1994, p. 99-100.

market.[73] According to the Memorandum on the Anti-Trust Policy of the High Authority in 1954,[74] "A genuine single market cannot be brought about except through free competition. If the market were to remain subject to the arbitrary decisions of the cartels, or to the restrictive practices of monopolies, then the benefits of the single market would soon be offset by the effects of price-fixing and production quotas...."[75]

Articles 81 and 82 were included in the Treaty of Rome in order to combat restraints on competition that could interfere with the creation of the Common Market.[76] Article 81 prohibits all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States. Article 82 prohibits any abuse by one or more undertakings of a dominant position within the common markets. Articles 81 and 82 EC were a matter of public policy and these fundamental provisions of the Treaty were designed to protect competition in the single market.[77]

However, this does not mean that there was no interest in obtaining the benefits of competition.[78] Both the Commission (the EU competition authority) and the Court have referred to the potential benefits: lower prices, more rapid technological progress, better choice and better quality, as an anticipated result of

---

[73] References here are numerous. See, e.g., Alison Jones and Brenda Sufrin, "EC Competition Law", 3rd ed., Oxford, 2007, p.38-55; Sweet & Maxwell Limited and Contributors, "From Freiburg to Chicago and Beyond-The First 50 Years of European Competition Law", E.C.L.R.29(2), 2008, p.82; Barry E. Hawk, Antitrust in the EEC--The First Decade, 41 Fordham L. Rev. 229, 231 (1972) ("Single market integration, and the elimination of restrictive practices which interfere with that integration, is the first principle of EEC antitrust law...."); see also Chrisotper Bellamy & Graham D. Child, "Common Market Law Of Competition"(3d ed.), 1987, pp.15-16; Walter Van Gerven, "Substantive Remedies for the Private Enforcement of EC Antitrust Rules Before National Courts," EUI-RSCAS/EU Competition Law and Policy Workshop, 2001, p. 5; Clifford A. Jones, "Private Enforcement of Antitrust Law in the EU, UK and US", Oxford, 1999, p. 25.; David J. Gerber, Ibid., p. 99-103; S. M. Willimsky, supra note 44, p.54;

[74] The High Authority was the fore-runner of the Commission in the European Coal and Steel Community(hereafter, ECSC).

[75] High Authority, European Coal and Steel Community, "Memorandum on the Anti-Trust Policy of the High Authority", 1954 , p. 1.

[76] The so-called "Spaak Report" of 1956, which served as the basis for the drafting of the Treaty of Rome, emphasized this function of Articles 81 and 82.

[77] *Eco Swiss China time Ltd. v. Benetton International NV*, C-126/97, [1999] ECR I-3055, para. 36 and *Manfredi v. Lloyd Adriatico Assicurazioni SpA*, C-295/04, [2006] ECJ, 348, para. 31.

[78] With respect to anticompetitive conduct, See generally, Beverley Robertson, "What is a Restriction of Competition? The Implications of the CFI's Judgment in O2 Germany and the Rule of Reason", ECLR, 2007.

improved competition.[79]

Furthermore, these two defining features of the creation of the common market and protection of competition are related and mutually reinforcing.[80] To the extent that competition law eliminates obstacles to the flow of goods, services, and capital across EU borders, it can serve the cause of unifying the market. A competitive and open single market can also provide the EU economy with the best guarantee to market integration and development of economy through increasing their efficiency.

Achieving sustained competition can simultaneously benefit consumers by increasing the number of actual and potential competitors in EU markets because competition is the force that drives undertakings to become efficient.[81] However, the history of EU competition law also shows that it has been driven by 'ordoliberal' concerns[82] about the protection of the structure of competition and the protection of competitors as well as the protection of consumers. This is seen in the judgment of one of the earliest cases in the European Court of Justice (ECJ), *Continental Can.*[83]

The Commission's present view on the objectives of competition law are exemplified. The Guidelines on the application of Art.81 (3) of the Treaty, where the Commission stated that:

"The objective of Article 81 is to protect competition on the market as a

---

[79] See generally, Neelie Kroes, "Effective Competition Policy-a Key Tool for Delivering the Lisbon Strategy", Introductory statement at EMAC Open Meeting of Coordinators, Speech/05/73, Brussels, 3rd, February, 2005; See also the Court's opinion in cases 56 and 58/64, *Consten and Grundig v. Commission*, [1966] ECR 299, 339-340.

[80] Some types of infringements are, of course, more closely associated with the integration imperative than others. See Joel Davidow, Competition Policy, Merger Control and the European Community's 1992 Program, 29 Colum.J. Transnat'l L.11, 1991, p.13.

[81] David J. Gerber, supra note 72, pp. 100-101; David J. Gerber, "The Modernization of European Community Competition Law : Achieving Consistency in Enforcement: Part 1", ECLR, 2006, p.10-11; see also Neelie Kroes's speech/05/477, supra note 39

[82] For an explanation of ordoliberal ideas of competition law, see W. Möschel, 'Competition Policy from an Ordo Point of View' in A. Peacock and H. Willgerodt (eds.), *German Neo-Liberals and the Social Market Economics* (MacMillan, 1989), 142.

[83] Case 6/72, *Europemballage Corp and Continental Can Co Inc* v. *Commission* [1973] ECR 215.

means of enhancing consumer welfare and of ensuring efficient allocation of resources. Competition and market integration serve these ends since the creation and preservation of an open single market promotes an efficient allocation of resources throughout the Community for the benefit of consumers."[84]

From this Guideline, it is submitted that the objective of competition in the EU according to the Commission is the pursuit of the enhancement of consumer welfare and the efficient allocation of resources. However, it must be noted that the EU pursues these objectives through market integration as well as ensuring competition

However, it should be noted that the ECJ, in a judgment in June 2009, stated the objectives of EC competition law as being wider than consumer welfare and efficiency and as encompassing both the protection of competitors and the protection of competition itself:

"Article 81 EC, like the other competition rules of the Treaty, is designed to protect not only the immediate interests of individual competitors or consumers but also to protect the structure of the market and thus competition as such".[85]

Given the above argument, it is submitted that the overall objective of EC competition law according to the Commission is to establish a system which ensures that competition in the common market is not distorted and thus to enhance consumer welfare by ensuring efficient allocation of resources.[86] However, the recent case law, quoted above, suggests that the Court also recognizes a wider 'economic freedom' goal so that competitors and the competition process are protected for their own sake and not just for the sake of consumer welfare.

---

[84] Guidelines on the application of Art.81(3) of the Treaty, [2004] O.J. C101/8, at para.13.
[85] *T-Mobile NL et la v. Raad van bestuur van de. Nederlandse Mededingingsautoriteit*, C-8/08, [2009] ECR I-(4.6.2009), para 38, repeated in effect in Case C-501/06 P, *Commission v. GlaxoSmithKline Services Unlimited* 6 October 2009, para.63.
[86] Cf. Recital (1) of Reg. 1/2003 and Article 3 (1)(g) EC.

1.2.2.3 The Objectives of Competition Law in the UK

The UK's Competition Act 1998 which reformed UK competition law has a more specific focus than the Fair Trade Act 1973.[87] The Competition Act 1998 relates primarily to the control of agreements between two or more undertakings, for which provision is made in the 'Chapter I Prohibition', and to abuses committed by dominant firm, the 'Chapter II Prohibition'.[88] However, the Competition Act does not, in fact, include clear goals or policy objectives of competition law.[89] However, the debates in Parliament while the legislation was being passed, and the White Paper which preceded it, shed some light on these. For example, it is worth noting that this was said in the House of Lords such as 'competition law provides the framework for competitive activity. It protects the process of competition.'[90]

Given that the Office of Fair Trade (hereafter, OFT) is a competition authority concerned both with competition policy and consumer protection, it is useful to consider the goals of the OFT as a whole. These goals are i) to encourage business to comply with competition and consumer law and to improve their trading practices through self-regulation, ii) to act decisively to stop hardcore or flagrant infringers and iii) to empower consumers with the knowledge and skills to make informed choices and get the best value from markets, and helping them resolve problems with suppliers.[91] The OFT's position is that competitive and customer-focused markets are good for fair-dealing business, which flourish when markets are competitive.[92]

In respect to the objectives of competition law, it is also worth noting that John Vickers, former Chairman of the OFT stated that:

"Our competition responsibilities-to combat anticompetitive agreements and behaviour, to scrutinize mergers, and to promote – are at once pro-consumer and

---

[87] The Fair Trade Act 1973 gave indications of the objectives of competition law at section 84(1)(a). The Fair Trading Act was repealed in 2002. It was replaced by the Enterprise Act 2002.
[88] See Competition Act 1988, Chapters I and II.
[89] Mark Furse, supra note 39, p. 257.
[90] Hansard (HL) 30 October 1997, col.1156.
[91] See the OFT website available at http://www.oft.gov.uk/about
[92] See the OFT website available at http://www.oft.gov.uk/advice_and_resources/resource _base/legal/ competition

pro-good business. So are our responsibilities under consumer law-to combat unfair trading practices, to encourage good self-regulation and to promote consumer awareness."[93]

Given the above discussion, it is submitted that the objectives of competition law in the UK are to make markets work well for consumers and to deliver low prices, innovation, choice and quality. These objectives are in line with the objectives of EU law, at least insofar as the latter are concerned with consumer welfare.

1.2.2.4 The Objectives of Antitrust Law in the US

In order to discuss the objectives of antitrust law, it is necessary to consider Sections of the Sherman Act[94] which Congress passed in response to public discontent with monopolistic business.

Section 1 of the Sherman Act states that:

"Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony."

Section 2 of the Sherman Act states that:

"Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trader or commerce among several States, or with foreign nations, shall be deemed guilty of a felony."

---

[93] John Vickers, "Chairman's foreword in the OFT Annual Report 2002-2003," 2003, p.6, http://www.oft.gov.uk/shared_oft/annual_report/2002/foreword.pdf.

[94] See 15 U.S.C §1, §2

The Sherman Act seeks to protect competition and consumer welfare. The Supreme Court has explained this in *Northern. Pac. Ry. Co. v. United States* case.

"The Sherman Act was designed to be a comprehensive charter of economic liberty aimed at preserving free and unfettered competition as the rule of trade. It rests on the premise that the unrestrained interaction of competitive forces will yield the best allocation of our economic resources, the lowest prices, the highest quality and the greatest material progress, while at the same time providing an environment conductive to the preservation of our democratic political and social institution."[95]

One commentator has described the main objective of antitrust law as being to promote the optimal use of resources and to promote competition for the welfare of the society and its consumers. [96] Although the pro-competitive principles of antitrust law generally are accepted by courts, its more specific goals are subject to debate.[97] The debate includes three views,[98] all of which incorporate economic efficiency to some degree.[99] This efficiency oriented approach is undertaken to

---

[95] *Northern. Pacific Railway. Co. v. United States*, 356 U.S. 1, 4 (1958)

[96] Harry First, supra note 56, p. 432.

[97] William J. Kolasky, "Global Competition: Prospects for Convergence and Cooperation", American Bar Association Fall Forum, 2002. In this article, he stated that the objective of antitrust law is consumer welfare through efficiency. Thus, antitrust law must not outlaw efficiency-enhancing transactions, agreements and conduct; With respect to the objectives of US antitrust law, see generally Mark Furse, supra note 39, pp. 250-255; See generally, R. H. Lande, "Wealth Transfers as the Original and Primary Concern of Antitrust: The Efficiency Interpretation Challenged", 34 Hastings L.J. 67 (1982). Lande's paper is an intensive look at the legislative histories of the antitrust laws. Ultimately, Lande rejects the view that economic efficiency was Congress's primary goal for the antitrust laws. Instead, he states that the antitrust laws were broad mandates to improve consumer welfare.

[98] Harry First, supra note 56, p.427; R.H.Lande, supra note 97, p. 68-70; Richard A. Posner, "Antitrust Law: An Economic Perspective", Chicago, 1976, p. 18-22.; Gerhart, "The Supreme Court and Antitrust Analysis: The Triumph of the Chicago School", SUAT CT. Rev., 1982, p.319. This view is not, of course, universally held; See generally, Pitofsky, "The Political Content of Antitrust" , 127 U. PA. L. Rev. 101 ,1979; Rowe, "The Decline of Antitrust and the Delusions of Models: The Faustian Pact of Law and Economics", 72 GEO. L.J., 1984, p. 1567. For the some reasons, the non-economic approach leads to an unpredictable and economically costly scope of liability. The view that efficiency should be the guiding standard for antitrust law does not require acceptance of efficiency as an ethical norm for society. If non-economic goals are admitted to antitrust analysis, then the scope of liability will be presumably expanded.; Posner, "The Ethical and Political Basis of the Efficiency Norm in Common Law Adjudication", 8 Hofstra L. Rev., 1980, p. 487.

[99] The efficiency could be defined as he difference between the cost of producing a product and the value consumers place on it. Use the terms 'efficiency' and inefficiency' conventionally to refer to the effect of a practice on total wealth. S. M. Willimsky, supra note 39, pp.54-55; Amanda Kay Esquibel, "Protecting Competition: The Role of Compensation an Deterrence for Improved Antitrust Enforcement", Florida Law Review, 1989, p.156; David Klingsberg, "Balancing the Benefits and Detriments of Private Antitrust Enforcement: Detrebling, Antitrust Injury, Standing, and Other Proposed Solutions", Cardozo Law

effectively ensure consumer interests. [100]

The first view considers economic efficiency along with *social, moral* and *political* concerns.[101] These concerns include the protection of small businesses, the dilution of concentrated economic power, and the promotion of individual liberty.[102] However, consensus is lacking on the relative importance of each of these concerns.[103]

The second view focus on the economic effects of wealth transfer by monopolists. In a monopoly situation, wealth transfers from consumers to the monopolist, and what would otherwise be consumer surplus become the monopolist's excess profits, as explained above.[104] Such excess profits are absent in a competitive market.[105] Under the second view, antitrust laws should deter wealth transfers to the monopolist and protect consumer surplus by preserving competitive prices.[106]

The third view concentrates on the inefficient misallocation of resources[107] which result when monopolists, as sole producers, ignore competitive consumer demand when choosing production levels. This misallocation harms consumer welfare because under monopoly, some consumers who would be willing to and able to pay a competitive price will be unable to purchase the goods.[108] It can therefore be argued that antitrust law should seek to maximize consumer welfare

---

Review, 1987-1988, p. 1223-1224.

[100] In respect to economic efficiency see also section 1.2.2.2 which deals with the objectives of competition law in the EU. Harry First, supra note 56, p. 432.

[101] R. H. Lande, "Wealth Transfers as the Original and Primary Concern of Antitrust: The Efficiency Interpretation Challenged", 34 Hastings L.J. 67, 1982, p. 69

[102] Ibid.

[103] Ibid.

[104] See R. Blair and D. Kaserman, "Antitrust Economics" 36(1985)

[105] Economic theory demonstrates that in the long-run competitive industry, each firm will make only normal, not excess, profits. Normal profits are defined as what the firm requires as a return to keep its resources employed in the industry. See E. Dolan, "Basic Macroeconomics", 3d ed., 1983, p.406-07.

[106] Patricia Hanh Rosochowicz, supra note 61, p.1; T. J. Muris, supra note 44, p.169; Esquibel, supra note 99, p. 157.

[107] The wealth transfer would result in a misallocation of resources if the monopolist were to take the rent and invest it in maintaining the monopoly instead of investing it in the production of some socially desirable good .

[108] Robert W. Crandall, Clifford Winston, "Does Antitrust Policy Improve Consumer Welfare? Assessing the Evidence", Journal of Economic Perspectives vol. 17, 2003, p. 46.

and allocative efficiency.[109] This 'Chicago' view is the one that has been in the ascendant in the US since the 1980's, replacing the previous concern of US antitrust law with protecting small competitors and other social, moral and political concerns as explained in the 'first view' above.[110]

1.2.3 Objectives of Private Competition Enforcement

In areas where private and public enforcement overlap conflicting objectives may arise. To solve these conflicts it is suggested that it should first be determined what purpose the private action serves. The key question is how private enforcement can and should work to protect existing and potential competition.[111]

There are many different objectives of private enforcement. In the US, for example, the priorities of objective of private competition enforcement have shifted from time to time.[112] From the perspective of victims of anticompetitive conduct the objective of private competition enforcement is to protect their rights and interests.[113] It is necessary to consider both its substantive goals and the tools available to achieve its ends. Generally it can be said that the possible objectives of private competition enforcement are compensation, deterrence, punishment and disgorgement of ill-gotten gains.[114]

The first objective of private enforcement can be said to be the achievement of corrective justice by assuring compensation for losses sustained by reason of any anticompetitive conduct.[115] The day-to-day work of implementing private

---

[109] Esquibel, supra note 99, p. 157.

[110] See e.g Judge Learned Hand in *United States v Aluminum Co of America* 148 F 2d 416 (2d Cir 1945), 429 when he said that the Sherman Act aimed at preserving 'for its own sake and in spite of possible cost, an organization of industry in small units'.

[111] Ulf Boge, Konrad Ost, "Up and Running, or Is It? Private Enforcement –The Situation in Germany and Policy Perspectives", European Competition Law Review(ECLR) 27(4), 2006, p.198.

[112] Hannah L. Buxbaum, "Private Enforcement of Competition Law in the Untied States- of Optimal Deterrence and Social Costs", in 「Private Enforcement of EC Competition Law」 (ed. by Jürgen Basedow), Kluwer Law, , 2007, p. 60.

[113] Ulf Boge, Konrad Ost, supra note 111, p.197.

[114] See generally, Edward D. Cavanagh, "Detrebling Antitrust Damages: An Idea Whose Time Has Come?, "61 Tul. L. Rev. 777, 1987, p. 786-788. In this article, Edward D. Cavanagh compares the goals and effects of mandatory trebling.

[115] Wouter P. J.Wils, "Should Private Antitrust Enforcement Be Encouraged in Europe?" 26(3) World Competition 473, 2003, p. 478.; Esquibel, supra note 100, p. 153.

enforcement should involve *compensation.*[116] It can make the infringer compensate those who have innocently suffered from its anticompetitive conduct.[117] Victims of infringements who pay too much or who are barred from participation in the market can thus obtain compensation. Achieving corrective justice through compensation is a tool to increase private parties' motivation to monitor anticompetitive conduct on the market because direct justice through compensation can make the competition rules relevant for individuals.

As a previous EU Competition Commissioner said, the second objective of private enforcement is deterrence by creating a credible threat of detection and sanctions.[118] Private enforcement of competition law aims to prevent infringement and seeks to avoid the occurrence of anti-competitive conduct and effects. Even though actions for damages are primarily about victims effectively exercising rights protected by competition law, an enhanced level of actions for damages also have the positive effect of increasing deterrence for potential infringers since it creates a risk of having to pay damages for the harm caused by an infringement of the competition rules.[119] Through deterrence, competition law can contribute to ensuring that anticompetitive conduct does not occur.[120] Therefore the anticompetitive effects which are meant to be avoided are indeed avoided.

For instance, as will be seen in Chapters 4 and 5, to achieve optimal enforcement US law has focused on optimal deterrence rather than compensation. A leading US authority has stated that in the US, "the primary goal of antitrust remedies is to achieve optimal deterrence."[121] The US Supreme Court has stressed

---

[116] Foad Hoseinian, "Passing on Damages and Community Antitrust Policy : An Economic Background", World Competition, 2005, p. 7.
[117] Ibid., p. 6.
[118] M.Monti, "Private Litigation as a key complement to public enforcement of competition rules and the first conclusions on the implementation of the new Merger Regulation" Speech/04/403, September 17, 2004, 3; European Commission, "Commission Staff Working Paper accompanying the White Paper on Damages actions for breach of the EC antitrust rules", Com (2008) 165 final, 2008, p.9; Edward P. Henneberry, "Private Enforcement in EC Competition Law: The Green Paper on Damages Actions- The Passing-on Defenses and Standing for Indirect Purchasers, Representative Organizations and Other Groups", Heller Ehrman, LLP, 2006, p.2 ; Wils, supra note 115
[119] Wils, supra note 115, pp.478-479; European Commission, "Commission Staff Working Paper annex to the Green Paper on Damages actions for breach of the EC antitrust rules", SEC (2005) 1732, p.3.
[120] Matthew C. Stephenson, "Public Regulation of Private Enforcement: The Case for Expanding the Role of Administrative Agencies", 91 Va.L.Rev. 93, 2005, p.98-99.
[121] Easterbrook, "Predatory Strategies and Counterstrategies", 48 U. Chi. L. Rev. 263, 1981, p. 319

the importance of the goals of both compensation and deterrence in antitrust private enforcement since its early case law,[122] but eventually "deterrence has emerged as paramount." [123] The compensation goal is subsumed within the efficiency framework.[124] In this scheme of things compensation of parties injured by antitrust infringement is merely a by-product of private enforcement.[125]

Richard Posner has explained why US law prioritises deterrence:

"The basic objective of a remedies system is to deter people from violating the law. Another is to compensate the victims of the violators, but I regard this as subsidiary because a well-designed system of deterrence would reduce the incidence of antitrust violations to a low level and because, as we shall see, such a system would, as a by-product, assure adequate compensation except in those instances where the costs of administrating compensation were prohibitive."[126]

This orientation is illustrated clearly in the judgment in *Hanover Shoe*,[127] which eliminated the passing on defence and in *Illinois Brick*,[128] which barred actions by indirect purchasers.[129] In both decisions, the US Supreme Court stated that the complexity of establishing exactly where in the purchase chain overcharges had been absorbed would undermine effective deterrence.[130] As will be discussed in Chapters 4 and 5 the Supreme Court has therefore focused on ensuring optimal deterrence even when that means denying the chance of compensation to real victims injured by antitrust conduct.[131] In respect to the deterrent effect of private enforcement, private litigation is therefore of great importance, especially, in cases where no prior action has been taken by the authorities.

---

[122] *Perma Life Mufflers Inc. v International Parts Co.*, 392 U.S. 134, 139 (1968).
[123] Hannah L. Buxbaum, supra note 112, p.44.
[124] Ibid., p. 46.
[125] Easterbrook, supra note 121, p. 319.
[126] See Posner, "Antitrust Law-An Economic Perspective", 1976, p. 21 or 22.
[127] *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*, 392 U.S. 481(1968), p. 494. See Section 4.2 which deals with *Hanover Shoe, Inc* case.
[128] *Illinois Brick Co. v. State of Illinois* 431 U.S. 720 (1977). See section 5.2 which deals with *Illinois Brick Co* case.
[129] Hannah L. Buxbaum, supra note 112, p. 46.
[130] Ibid. I will discuss *Hanover Shoe* in chapter 4 (Passing on defence) in detail. I will also discuss *Illinois Brick* in chapter 5(Indirect purchaser litigation) in detail.
[131] Easterbrook, supra note 121, p. 319.("the Court conclude that adequate deterrence should be preferred to a fair system of compensation").

The EU, moreover, has taken the view that private actions have a deterrent effect, and that therefore the right of victims of a competition law infringement to bring an action for damages could be seen as public interest.[132] Thus, one can conclude from this that any right of action for compensatory damage should ideally be shaped by the larger societal goal of the remedy, in order to avoid the danger of over-deterrence.[133]

The third objective of private enforcement can be seen as providing punishment. Punishment can be defined as being imposed when a defendant is ordered to pay an amount in excess of actual gain. If the total amount of fines and damages paid is in excess of the actual gain made by the infringer, private enforcement can have punitive effect. Once a competition infringement has taken place, it can be argued that it is desirable to punish the infringer.

The fourth objective of private enforcement can be the disgorgement of ill-gotten gains. Private enforcement can ensure that a defendant will not retain monetary benefit from its wrongdoing.[134] Even if public enforcers do not sanction the infringers to the extent of the profits of the infringement, competition law infringers can still be denied the fruits of their illegal conduct by virtue of the private enforcement.

---

[132] Commission Staff Working Paper accompanying the White Paper, supra note 118, p, 10; See generally, Michele Carpagnano, "Private Enforcement of Competition Law in Italy: Analysis of the Judgment of the European Court of Justice in Joined Cases C-295-289/04", 3(1) Competition Law Review 47, 2006.; Christian A. Heinze, "Discussion: Private Enforcement of EC Competition Rules in the ECJ- Courage v. Crehan and the Way Ahead", in 「Private Enforcement of EC Competition Law」 (ed. by Jürgen Basedow), Kluwer Law, , 2007, p.39.

[133] William H. Page, "Policy Choices in Defining the Measure of Antitrust Damages", DAF/COMP/WP3, 2006, p.5.

[134] *Blue Shield of Virginia v. McCready*, 457 U.S. 465, 472-73 (1982) (explaining that a private remedy serves to deprive wrongdoers of their ill-gotten gains). But this may only be so if the system allows for more than compensatory damages. See e.g. in the UK, *Devenish Nutrition Ltd v Sanofi-Aventis* [2008] EWCA Civ 1086, discussed *infra* section 3.2.3 which deals with the current situation in respect of the criteria and measurement of damages in the UK.

1.3 Overview of Public and Private Competition enforcement

1.3.1 Introduction to Private and Public Competition enforcement

1.3.1.1 Definition of Private Competition Enforcement

Natural and legal persons can defend themselves against infringements of competition law through actions before courts. A preliminary question is how to define private enforcement. In respect to the definition of private enforcement, it is submitted that it is summed up in the following passage:

"If private enforcement were to be given a rather broad meaning, it meant enforcement of competition rules through the initiative or intervention of private parties. Such a definition seems to include cases of private parties acting also as complainants to competition enforcement agencies. However, it can be defined as privately triggered public enforcement not as private enforcement. Therefore, private enforcement can be defined as the situation as any private parties involved in the enforcement of competition rules as litigants against perceived offenders of competition law."[135]

1.3.1.2 Role of Private and Public Competition Enforcement

The key question is how to achieve effective private enforcement to ensure competition because public enforcement alone cannot ensure competition. There has been much debate about ensuring competition through private enforcement. Competition enforcement can be described as an effective tool for fostering sustainable competition, breaking down barriers to entry, increasing economic efficiency and protecting consumer welfare by detecting infringements and sanctioning the infringers.[136] Correct enforcement of competition law is crucial for maintaining the ability of companies to compete effectively and efficiently. In designing any system of competition enforcement, it is essential to ensure the

---

[135] Claus Dieter Ehlermann & Isabela Atanasiu(ed.), "European Competition Law Annual 2001: Effective Private Enforcement of EC Antitrust Law", Hart Publishing, 2003, p. xxiii.
[136] Edward P. Henneberry, supra note 118, p.331.

efficient and effective enforcement of the competition rules.

As already explained enforcement of competition law can happen in two ways, by public authorities or by private parties. The European Commission's Green Paper stated that private and public enforcement are part of a common enforcement system and serve the same aim: to deter anticompetitive practices forbidden by competition law and to protect firms and consumers from these practices. [137] Combating infringements of competition law therefore raises fundamental questions about the relationship between public and private enforcement and their respective roles in the implementation of the law.

On the one hand, public authorities are entrusted with the task of supervising and regulating the conduct of undertakings as far as it is relevant to the public interest. The increasing scale and frequency of international trade activities have required public competition authorities to adapt and enforce their competition laws in efficient ways. Public authorities conduct proceedings against a party or parties which it suspects have infringed competition law. The procedure may be commenced by the authorities upon their own initiative or by complaints by private parties. If an infringement is found, the authorities may require the undertaking concerned to bring the infringement to an end. Public authorities can also impose substantial fines to punish or disgorge illegal gains.

On the other hand, private parties can enforce competition law and rights through private enforcement. Private parties can play a double role in the enforcement of competition law. In respect to public enforcement, they can bring complaints about anticompetitive conduct to competition authorities. Infringement decisions of competition authorities are a major operative part in the system for protecting competition. In respect to private enforcement, private parties have an incentive to bring actions in order to get a remedy for damage caused by anticompetitive conduct because anticompetitive conduct can cause damage, not only to competition in the whole economy, but also to individual persons.[138]

---

[137] European Commission, "Green Paper - Damages Actions for Breach of the EC Antitrust Rules", COM (2005) 672 final, p.3.

[138] Neelie Kroes, "Damages Actions for Breaches of EU Competition Rules: Realities and Potentials",

Private enforcement relies on actions by injured private parties, including competitors, customers and co-contractors.

1.3.1.3 The Way to Use Private Competition Enforcement

Private enforcement can be used in two ways. It can be used as a *shield* when it is invoked as a defence against a contractual claim for performance by asserting the invalidity of anticompetitive agreements. Private enforcement can be also used as a *sword* when it is used proactively by private enforcers such as businesses and consumers as a basis for applying for an injunction or bringing actions for damages.[139] From a private enforcement perspective, the most significant cases are where competition law is pleaded as a *sword* because private parties can get remedies only through damages actions before courts. Although it may be at times sufficient for parties to bring complaints, and rely on the public competition authorities to stop or prevent the anticompetitive conduct, the authorities usually cannot compensate individuals for loss caused by infringement of competition laws.[140]

As explained above, two main functions of private enforcement can be compensation and deterrence. Providing compensation through private enforcement is not only necessary from a compensation point of view but also, from a deterrence perspective, fills in the gaps left by the public enforcers despite it being motivated by the pursuit of a more personal interest.[141] Private enforcement could straddle

---

Opening speech at the conference 'La reparation du prejudice cause par une pratique anti-concurentielle en France, Speech/05/613, Paris, 2005, p.2.

[139] F G Jacobs and T Deisenhofer, "Procedural Aspects of the Effective Private Enforcement of EC Competition Rules: A Community Perspective," European Competition Law Annual 2001, Hart Publishing, 2003; B Rodger and A MacCullogh, "Wielding the Blunt Sword: Interim Relief for Breaches of EC Competition Law before the UK Courts", ECLR, 17(7), 1996, p. 393-402,"; Wils, supra note 115, p.473-488.; Ulf Boge, Konrad Ost, supra note 111, p.197.

[140] Kent Roach, Michael J. Trebilcock, " Private Enforcement of Competition Law", Policy Options, 1997 p. 14; Romanian Competition Council, "Public consultation on the Green Paper-Damages actions for breach of the EC antitrust rules", Position of the Romanian Competition Council, 2006, p. 12. See also John Pheasant, "Private Antitrust Damages in Europe: The Policy Debate and Judicial Developments", Antitrust, 2006, p.59; Elena Wind, "Remedies and Sanctions in Article 82 of the EC Treaty", ECLR, 2005, pp. 663-666 ; Ulf Boge, Konrad Ost, supra note 111, pp. 197-198; OFT 916, supra note 37, p. 5

[141] Robert H. Lande and Joshua P. Davis, "Benefits from private antitrust enforcement : an analysis of forty cases", 42 University of San Francisco Law Review 879, 2008, p.882; US Department of Justice, "Competition and Monopoly: Single-Firm Conduct under Section 2 of the Sherman Act", September, 2008, p.160; European Parliament resolution of 26 March 2009 on the White Paper on damages actions

both the private dispute between the parties and the wider public interest in promoting sound competition laws.[142]

However, these two functions must not be completely equated. Compensating the victims of the anticompetitive behaviour is arguably more important than the deterrent function. It can be argued that the primary function of the private enforcement is compensation because private competition enforcement through damages actions can be the *only* way that victims of anticompetitive conduct can obtain redress.[143] Damages actions can promote a personal interest and ensure the protection of an individual right protected by competition law in compensatory nature.[144]

For instance, although it recognizes the public nature of the goals of competition law, the EC Commission has acknowledged that the legitimate purpose of private damages actions is to ensure compensation for harm suffered and not to

---

for breach of the EC antitrust rules (2008/2154(INI)), para H; Barry Rodger, "Private Enforcement of Competition Law, The Hidden Story : Competition Litigation Settlements in the United Kingdom, 2000-2005", 29(2) E.C.L.R.96, 2008, p.98; Patricia Hanh Rosochowicz, Deterrence and the relationship between public and private enforcement of competition law, Amsterdam Centre for Law and Economics Workshop, 2005, pp. 1, 5; see generally, Michael Kent Block, Federick Carl Nold, Joseph Gregory Sidak, "The Deterrent Effect of Antitrust Enforcement", The Journal of Political Economy, 1981.; Byung-Ju LEE, "The Harmonization of Public and Private Enforcement: A Korea Perspective", Seoul International Competition Forum, 2008, p. 1; Joseph P. Bauer, "Multiple Enforcer and Multiple Remedy; Reflections on the. Manifold Means of Enforcing the Antitrust Laws: Too Much, Too Little, or Just. Right?", 16 Loyola Consumer Law Review 303, 2004, p.310-311; Jonathan B. Baker, "The Case for Antitrust Enforcement", Journal of Economic Perspectives 2003, p.27; Claus Dieter Ehlermann & Isabela Atanasiu (ed.),"European Competition Law Annual 2001: Effective Private Enforcement of EC Antitrust Law", Hart Publishing, 2003, p. xxiv-xxxv; Douglas H. Ginsburg, "Comparing Antitrust Enforcement in the United States and Europe, Journal of Competition Law and Economics, 2005, p.439; Mario Monti, "Private Litigation as a Key complement to Public Enforcement of Competition Rules and the First Conclusions on the Implementation of the New Merger Regulation", Speech 04/403, IBA-8th Annual Competition Conference, Fiesole, 2004; William E. Kovacic, "Private Participation in the Enforcement of Public Competition Laws", British Institution of International & Comparative Law- Third Annual Conference on International and Comparative Competition Law: The Transatlantic Antitrust, 2003 p. 2; Donncadh Woods, "Private Enforcement of Antirust Rules : Modernization of the EU Rules and the Road Ahead", Loyola Consumer Law Review, 2004 p. 433.; Roach K. & Trebilcock M.J., "Private Enforcement of Competition Laws", 34 Osgoode Hall L.J. 461, 1996, p.14.

[142] Dan Wilsher, "The Public Aspects of Private Enforcement in EC law: Some Constitutional and Administrative Challenges of a Damages Culture", The Competition Law Review, 2006, p. 34.

[143] Francisco Marcos and Albert Sánchez Graells, "Damages for breach of the EC antitrust rules: harmonising Tort Law through the back door?", InDret, 2008, p. 9, available www. Indirect.com; Assimakis P Komninos, "EC Private Antitrust Enforcement: Decentralised Application of EC Competition Law by National Courts", Hart Publishing, 2008, p.9; Robert H. Lande and Joshua P. Davis, supra note 141, p.904.

[144] Commission Staff Working Paper accompanying the White Paper, supra note 118, p.11; Patricia Hanh Rosochowicz, supra note 58, p. 5.

act as a regulatory enforcement mechanism.[145] However, unlike competition authorities, courts cannot enforce the competition rules on their own initiative. Cases first need to be brought before them.

1.3.1.4 Stand-alone and Follow-on Actions

Victims of anticompetitive conduct may bring damages actions against the infringers for damages following administrative proceedings by a public authority that find a breach of competition rules. Such subsequent actions for damages are usually referred to as 'follow-on actions'.[146] Follow on actions can encourage private enforcement if the procedural rules provide that there is no need to prove an infringement that the public authority has already established.

Stand-alone actions, on the other hand, are actions which involve a third party suing for damage against the infringers of competition rules where there has been no prior interference by a public authority. In this action, the party that raises the competition law problem has to prove the infringement.[147] Plaintiffs may be reluctant to bring actions in cases involving complex economics in the absence of a decision by competition authorities.

As far as Korea is concerned, in respect to the effect of decisions of infringement of the KFTC, the Supreme Court recognized *factual presumption power* in the *Aloe* case.[148] This means that although the KTFC's decision was not actually binding, the Supreme Court accepted its findings of fact as convincing or compelling fact insofar as there was no evidence to overrule the decision of the KFTC.

---

[145] White Paper on Damages actions, supra note 24, at section 1.1; Tim Reher, "The Commission's White Paper on Damages Actions for Breach of the EC Antitrust Rules", European Antitrust Review 2009, p.1.
[146] Commission Staff Working Paper accompanying the White Paper , supra note 118, p.41.
[147] Komninos, supra note 143, p.6-7.
[148] Supreme Court (1997.4.22), 96DA54195. In *Aloe* case, Supreme Court recognized the broader factual presumption power of the decision of the KFTC. The Supreme Court recognized that there was close relationship between unfairly refusing any transaction (23(5)) and trade under terms and conditions which unfairly restrict or disrupt business activities (23(1)). Therefore, the Supreme Court held that the defendant's practice was illegal and that it was liable to compensate the plaintiff for the damage it had suffered. The Supreme Court laid this rule down for the first time in this case.

As far as the EU is concerned, the position is that decisions of the Commission are binding on national courts by virtue of Article 16(1) of Regulation 1/2003.[149] However, the Commission has proposed that a final decision by an NCA and a final judgment by a review court upholding the NCA decision or itself finding an infringement should be accepted in *every other* Member State as irrebuttable proof of the infringement in subsequent civil competition damages cases.[150] In other words, the Commission would not limit the binding effect of an NCA decision to the domestic courts of the same Member Sates. The proposed rule set out above would confer binding effect only on decisions that are final, i.e. where the defendants has exhausted all appeal avenues, and relates only to the same practices and same undertaking(s) for which the NCA or the review court found an infringement.[151]

As far as the UK is concerned, at present the Competition Act 1998 only provides for the Competition Appeal Tribunal (CAT) to hear follow on actions. However, it is worth noting that the UK's Office of Fair Trading (hereafter, OFT) has endorsed private, stand-alone competition litigation before the CAT as an effective tool for consumers and businesses hurt by price-fixing and other anti-competitive practice.[152] If adopted, parties could seek to recover losses before the CAT even if the OFT or European Commission has yet to take action against suspected anticompetitive practice. Otherwise standalone actions have to be brought before the ordinary courts.

As far as the US is concerned, Section 5(a) of the Clayton Act, enacted in 1914, simply provides that "A final judgment or decree ... that a defendant has violated said [antitrust] laws shall be prima facie evidence against such defendant in any action or proceeding brought by any other party against such defendant under said laws as to all matters respecting which said judgment or decree would be an estoppel as between the parties thereto ...."[153]

---

[149] *Inntrepeneur Pub Company v Crehan* [2006] UKHL 38.
[150] See White Paper on Damages actions, supra note 19, Section 2.3.; See also infra section 5.3.1.1 of this thesis which deals with prohibition of any limits of standing.
[151] White Paper on Damages actions, supra note 19, Section 2.3.
[152] OFT 916, supra note 37, pp.14~30.
[153] Clayton Act, 15 U.S.C. § 16 (2004).

The basic Section 5(a) rule has been said to make good sense in terms of efficiency. If the government wins, then the defendants face follow-on actions in which the plaintiffs do not have to prove liability what the government has already established.[154] In the US, private actions most frequently follow on the public enforcement of competition authorities because plaintiffs have been reluctant to bring actions without the assistance of public enforcement.[155]

It is submitted that this binding effect of public authority decisions increases legal certainty and enhances the consistency in the application of competition rules. Without such a rule, infringers can call into question their own breach of the law that has already been established by competition authorities and courts have to re-examine all the facts and legal issue already investigated and assessed by competition authorities.[156] Such re-examination often entails lengthy disputes between the parties and their legal and economic experts. Therefore, not recognizing binding effect increases litigation costs and the uncertainty of damages actions.[157]

1.3.2 Benefits of Private Competition Enforcement

The private competition enforcement of competition law has certain advantages over public enforcement. Here I discuss three major ones.

---

[154] Donald I. Baker, "Revising History-What have we learned about private antitrust enforcement that we would recommend to others?", Loyola Consumer Law Review,2004 p. 389; see generally, Thomas E. Kauper, Edward A. Snyder, "An Inquiry into the Efficiency of Private Antitrust Enforcement: Follow-on and Independency Initiated Cases Compared" 74 GEO.L.J. 1166, 1986.

[155] See Hannah L. Buxbaum, supra note 112, p. 49; see also P. Friedman, D. Gelfand and C. Nordlander , etc., "Comments of the Section of Antitrust Law and the Section of International Law of the American Bar Association in Response to the Request for Public Comment of the Commission of the European Communities On Damage Actions for Breaches of EU Antitrust Rules", ABA, April 2006, p.15; Joseph P. Bauer, "Reflections on the Manifold Means of Enforcing the Antitrust Laws: Too Much, Too Little, or Just Right?", 16 Loyola Consumer Law Review 303, 2004, pp.311-312; Patricia Hanh Rosochowicz, supra note 61, p.6; Edward Cavanagh, supra note 42, p. 156

[156] European Commission, "White Paper on Damages actions for breach of the EC antitrust rules", Com (2008) 165 final, Section 2.3.

[157] Rainer Becker, Nicolas Bessot and Eddy de Smijter, " The White Paper on damages actions for breach of the EC antitrust rules", Competition Policy Newsletter, ISSN 1025-2266, 2008, pp.10-11.

1.3.2.1 Ensuring a High Level of Compliance and Developing a Competition Culture

To ensure competition, public enforcement is not the only means of achieving compliance with competition laws. Private enforcement can ensure a high level of compliance and support the development of a culture of competition.[158] An effective legal framework for private actions has the effects of improving compliance levels. A high level of compliance of the competition rules will only be a realistic if victims of infringements of competition rules know they are able to fight - and win - their case in court. The more citizens and undertakings stand up for their right to damages, the more incentive the potential perpetrators of illegal actions will have to comply. Encouraging private competition actions before courts can increase the overall enforcement of the competition rules and the likelihood of competition law infringements being discovered and penalized.[159]

As one commentator on the European Commission's Green Paper on Damages has said:

"Private enforcement can play an important role in enhancing compliance with antitrust legislation, since it potentially increases deterrence. This is true simply because infringements of antitrust law may not exclusively result in public proceedings and ultimately in administrative or criminal penalties, if there is also room for private enforcement. Court actions leading to damages awards can have a similar effect as sanctions imposed by the competition authorities."[160]

Facilitating private competition actions may broaden the basis of support for the competition rules and make competition policy more real through direct involvement of private parties.[161] For instance, the ECJ in its *Courage* decision stated that the right to claim damages can make a significant contribution to the maintenance of effective competition in the Community by discouraging practices

---

[158] Michele Carpagnano, supra note 132, p.48.; Neelie Kroes's speech/05/613, supra note 138, p.2.
[159] Assimakis P. Komninos, "Public and Private Antitrust Enforcement in Europe: Complement? Overlap?", 3(1) Competition Law Review 5, 2006, p.9.
[160] Christian Diemer, "The Green Paper on Damages Actions for Breach of the EC Antitrust Rules", 27 European Competition Law Review 309, 2006, pp.310-311.
[161] Ulf Boge, Konrad Ost, supra note 111, p.197.

forbidden by the competition rules.[162]

Thus, private actions may heighten the detection rate of anticompetitive conduct if they do not follow a public enforcement i.e. if they are 'stand-alone' rather than 'follow-on' actions.[163]

A higher level of compliance through a considerable number of private actions could contribute to further developing a culture of competition amongst market participants such as companies and consumers.[164] Public resources are not sufficient to pursue all of the cases to create a sufficient deterrent effect against infringing activity. The often limited resources of competition authorities could mean in certain situations that they have to pursue other priorities. Due to limited resources public authorities are often unable to take on cases that only affect individual companies and are of minor overall economic importance.[165] Through private enforcement private parties can take the initiative to advocate their interests. This seems particularly important for cases that may be of comparably low overall importance for the authorities, but of high value to the individual.

1.3.2.2 Cost Benefit over Public Enforcement

Private enforcement has a cost benefit over public enforcement. It is claimed that the costs of detecting possible infringements and gathering initial evidence are lower than the costs of public enforcement because private enforcers are better informed about their own particular damage and the related industry.[166] Public enforcers regulate a vast array of industries, and therefore cannot detect anticompetitive practices as easily as private enforcers who experience these practices on a regular basis.

---

[162] *Courage v Crehan*, C-452/99, [2001]ECR I-6297, para.27.
[163] See section 1.3.1.4 which deals with stand-alone and follow-on actions; Patricia Hanh Rosochowicz, supra note 58, p.7.
[164] M. Monti's speech 04/403, supra note 118 ; M. Monti, "Competition for Consumers' Benefit", Speech in European Competition Day, Amsterdam, speech 04/470, 2004; John Pheasant, supra note 140, p.59;
[165] Ulf Boge, Konrad Ost, supra note 111, p.197.
[166] Jakob Rüggeber and Maarten Pieter Schinkel, "Consolidating Antitrust Damages in Europ: A Proposal for Standing in Line with Efficient Private Enforcement", World Competition, 2006 p. 396; M. Harker and M. Hviid, supra note 35, p. 279; Christian Diemer, supra note 160, p. 311

There is a widespread view that the competition authorities do not have at their disposal all the public financial and human resources that they would need in order to reach an optimal level of enforcement.[167] Private enforcement could ease the burden on competition authorities because it not only increases the volume of enforcement, but shifts the expense of enforcement away from the governmental agencies, thereby conserving public resources.[168] The crucial benefit of private enforcement over public enforcement derives from cases which would not otherwise be brought because the relevant information has not come to light.[169] Efforts to encourage private parties to take legal action may induce them to make better use of their information, which could otherwise be lost to public authorities.

For example, the US Congress created the private right of action to supplement public enforcement because it was aware that the government did not have the necessary resources to uncover, investigate, and prosecute all infringements of the antitrust laws.[170]

1.3.2.3 Ensuring Stability of Legal Norms

It is argued that private enforcement can help ensure the stability of legal norms by preventing abrupt transitions in enforcement policy.[171] Private enforcement can interpret competition law independently of the attitude of public enforcers and play an important role in establishing precedents independent of public policy, even though private enforcement has not been wholly independent of the policy of public enforcers.[172] Abrupt transitions in the enforcement policy of

---

[167] Lowri Evans, "Private enforcement and public enforcement – a European perspective", The 5th Seoul International Competition Forum, 2008, p. 37; Toru Akzeki, "The Optimal Harmonization of the Public and Private Enforcement(Japanese Case) ", The 5th Seoul International Competition Forum, 2008, p. 55; Jacobs, 'Civil Enforcement of EEC Anti-trust Law' (1984) 82 Mich LR 1364 ; K. Holmes, supra note 20, p. 198; Patricia Hanh Rosochowicz, supra note 61, p. 15; David Klingsberg, supra note 99, p. 1220. See also, *State Oil Co. v. Khan*, 522 U.S.3(1997); *Monsanto Co. v. Spray-Rite Service Corp.*, 465 U.S. 752.

[168] See *Califonia v. Am. Stores Co.*, 495 U.S. 271, 284(1990)

[169] M. Harker and M. Hviid, supra note 25, p. 279.

[170] See, e.g., *Texas Indus., Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630 (1981) at para 642 (explaining that the private action "supplements federal enforcement and fulfils the objects of the statutory scheme").

[171] Coffee, J. C. Jr., "Rescuing the Private Attorney General: Why the Model of the Lawyer as Bounty Hunter is not Working", (1983) 42 Maryland Law Review 215, p. 227.

[172] Magnus Gustafsson, "What are the Prospects for Enhanced Private Antitrust Litigation? A Swedish Perspective", 30(4) European Law Review, 2005, p.509.

public authorities do not affect civil proceedings. This implies a wider scope of enforcement beyond the priorities set by the competition authorities.[173] To do this, however, private competition enforcement must be encouraged and not entirely dependent upon public initiatives.[174]

For instance, in the US, the DOJ can set its own antitrust enforcement policy, but not that of the States or of private litigants. It has been argued that this should be considered strength of the US system:

"Private enforcement also performs an important failsafe function by ensuring that legal norms are not wholly dependent on the current attitude of public enforcers or the vagaries of the budgetary process and that the legal system emits clear and consistent signals to those who might be tempted to offend. Absent private enforcement, potential defendants would have a considerably stronger incentive to lobby against public enforcement efforts or to seek to curtail funds to public enforcement agencies. Ultimately, private enforcement helps ensure the stability of legal norms by preventing abrupt transitions in enforcement policy that have not been sanctioned by the legislature."[175]

1.3.2.4 Opportunity to choose the most Effective Enforcement

The extensive use of private enforcement can ensure that the more effective remedies will be used in accordance with the proper procedures. This is because it can offer private parties the opportunity to choose the more effective action between private enforcement and public enforcement.[176]

---

[173] Coffee, J. C. Jr., "Rescuing the Private Attorney General: Why the Model of the Lawyer as Bounty Hunter is not Working", (1983) 42 Maryland Law Review 215, p. 217; Clifford A. Jones, "A New Dawn for Private Competition Law Remedies in Europe? Reflections from the US", EUI-RSCAS/EU Competition 2001/Proceedings, 2001, p. 5.

[174] Neelie Kroes, "Reinforcing the fight against cartels and developing private antitrust damage actions: two tools for a more competitive Europe", Commission/IBA Joint Conference on EC Competition Policy, Speech/07/128, Brussels, 2007, available at http://europa.eu.

[175] Coffee, J. C. Jr., "Rescuing the Private Attorney General: Why the Model of the Lawyer as Bounty Hunter is not Working", (1983) 42 Maryland Law Review 215, p. 217.

[176] "Private antitrust enforcement of EC competition rules: recent developments", Competition Law insight, 2004, p. 3.

Private enforcement has the advantage that parties can combine claims or separate heads of claims before national courts, especially in cases where competition related aspects are being assessed within a wider-ranging commercial dispute.[177] Even though public enforcement remains of critical importance for the ability to detect anticompetitive practices and costs,[178] a court can be in a better position to accelerate proceedings compared to a purely administrative process by granting faster relief through interim measures.[179]

The differences offer the private parties the opportunity to balance the advantages and disadvantages of private enforcement and public enforcement.[180] Thus, the private enforcement can create optimal conditions for individuals to challenge anticompetitive conduct.

1.4 Optimal Enforcement of Competition Law

Optimal enforcement is the best way of achieving the objectives of competition law. Optimal enforcement could be achieved by an effective and efficient combination of private and public enforcement. Public enforcement alone cannot make a substantial contribution to the optimal enforcement because of limited resources to use.[181] To coordinate private and public enforcement in a way which achieves optimal enforcement, three important questions must be asked. First, what is optimal enforcement? Second, how do private and public enforcement contribute to optimal competition enforcement? Third, are public and private

---

[177] Memo 05/489--European Commission Green Paper on damages actions for breach of EC Treaty antitrust rules--Frequently Asked Questions.

[178] Council Regulation 1/2003 on the implementation of the rules on competition laid down in Arts 81 and 82 of the Treaty, [2003] O.J. L1, Recital 7; Renato Nazzini, "The Wood Began to Move : An Essay on Consumer Welfare, Evidence and Burden of Proof in Article 82 Cases, European Law Review, 2006, p. 521; Michael Van Hoof, "Will the New European Union Competition Regulation Increase Private Litigation? An International Comparison", Connecticut Journal of International Law, 2004, p. 659.

[179] Woods, Sinclair and Ashton, "Private Enforcement of Community Competition Law: Modernisation and the Road Ahead" (2004) 2 Competition Policy Newsletter, p. 32.

[180] Antonio Capobianco, "Civil Actions---Europe---Private Antitrust Enforcement of EC Competition Rules: Recent Development", CLI 25(3), 2004, p.2.

[181] Jürgen Basedow, "Private Enforcement of EC Competition Law", Kluwer Law, 2007, p.15.; See e.g. Paulweber, "The End of a Success Story?: The European Commission's White Paper on the Modernisation of the European Competition Law: A Comparative Study about the Role of the Notification of Restrictive Practices within the European Competition and the American Antitrust Law", 23(2) World Competition 3, 2000, p.45: See generally, Wils, supra note 115.

enforcement conflicting or complementary in attempting to achieve optimal competition enforcement? I review these issues in the following section.

1.4.1 Definition of Optimal Enforcement

Optimal competition enforcement is hard to define. However, one possible way of approaching it is that optimal enforcement is a situation in which the overall costs for society in processing a competition action do not completely outweigh the possible benefits of such enforcement. [182] If a practice involves both anticompetitive effects and cost savings, optimal enforcement would deter it only when the welfare loss from a reduction in competition outweighed the gains in productive efficiency. In other words, competition enforcement including public or private enforcement must deter undertakings from certain forms of conduct only when the deadweight welfare loss exceeds costs. If the costs of seeking a higher level of enforcement would exceed the benefits, less enforcement would be desirable.

1.4.2 Under-Enforcement and Over- Enforcement of Competition Law

The appropriate level of competition enforcement represents a critical balance between under- and over-enforcement.[183] Optimal enforcement should minimize the sum of the costs of under-enforcement and the costs of over-enforcement.[184]

1.4.2.1 Under-enforcement of Competition law

Under-enforcement means that competition infringers are penalized for less

---

[182] Robert McNary, "Optimal Deterrence with Public and Private Antitrust Enforcement", University of Chicago Law school, Law and Economics Workshop, 2006, p. 2.
[183] Ibid.
[184] Robert H.Landes, "Optimal Sanctions for Antitrust Violations", 50 University of Chicago Law Review 652, 1983, p. 652-653.

than for the harm they cause. If a practice causes anticompetitive effects and allows benefits to flow to the infringer, competition enforcement is too low to offset the gain to the infringer. Under-enforcement can be caused both by limited public enforcement and by limited private enforcement. For instance, if victims can be discouraged because of limited compensation and substantial cost, it can cause under-enforcement. If there is systematic under-enforcement it means that the threat of legal actions is not enough to deter potential infringers from anticompetitive conduct.[185] Consumers may engage in excessive consumption, and companies will undertake overly risky activities.[186]

1.4.2.2 Over-enforcement of Competition law

Over-enforcement means that competition infringers are penalized for more than the harm they cause.[187] The key problem of over-enforcement is that some kinds of anticompetitive conduct are not pure social waste. They can be business practices permitting efficient practices and creating new wealth.[188]

Over-enforcement could occur if the private interest diverges from the public interest.[189] As discussed above, private parties are generally driven by the private profit motive, and thus private enforcement could systematically diverge from the public interest. Individuals do not consider social benefits when deciding whether to bring actions. [190] Posner notes that for private plaintiffs, enforcement expenditures are optimal when additional money spent on enforcement will increase the expected value of litigation.[191] There is no necessary connection

---

[185] "Barry J. Rodger, "Private Enforcement and the Enterprise Act : An Exemplary System of Awarding Damages, 24 ECLR 103, 2003, p. 106.
[186] A. Mitchell Polinksy and Steven Shavell, "Punitive Damages and Economic Analysis", Harv.L.Rev. 869, 1998, p. 873.
[187] Louis Kaplow, "Private versus Social Costs in Bringing Suit", 15 J. of Leg. Stud. 371,1986, p. 374.
[188] See For an argument generally applauding this wide-ranging analysis, see Comment, "A Farewell to Arms: The Implementation of a Policy-Based Standing Analysis in Antitrust Treble Damages Actions", 72 CALIF. L. Rev., 1984, p. 472-474.; Landes, supra note 184, p. 661-663.
[189] A.Mitchell Polinsky, "Detrebling vs Decoupling Antitrust Damags : Lessons from the Theory of Enforcement, 74 Georgetown Law Journal 1231, 1986, p. 1233.
[190] See generally, Becker, "Crime and Punishment: An Economic Approach", 76 J. POL. ECON. 169, 1968 ; Coase, "The Problem of Social Costs", 3 J.L. & ECON., 1960, p.1.
[191] Richard A. Posner, "Economic Analysis of Law", Aspen 6th ed., 2002, p. 581..

between the private benefit of litigation and the social benefit.[192]

With over-enforcement, the incentive to find infringers could be higher than socially desirable. Potential plaintiffs might undertake wasteful litigation and use excessive resources. [193] This could lead to undesirable effects such as disproportionate investment and a flood of unmeritorious claims.[194] With over-enforcement, consumers could face higher prices because it could also deter companies from engaging in pro-competitive and efficiency enhancing conduct.[195]

It is submitted that over-enforcement which deters pro-competitive conduct could be considered as more a substantial problem than under-enforcement because over-enforcement can discourage investment and innovation, which harms consumers' interests. If defendants are forced to allocate a disproportionate amount of financial resources to legal defence costs, they cannot not invest those resources on the research and development of new products, for example. Moreover, over-enforcement could cause defendants to incur costs resulting from the diversion of company executives from their normal responsibilities and by other organizational disruptions necessitated by an antitrust action. Therefore, it has been argued that any rules should be designed to curb detrimental motives and eventually to exclude socially costly effects.[196]

Therefore, as far as over-enforcement is concerned, public enforcement can have some advantages over private enforcement. One of the advantages of public enforcement is that it has more effective investigative and sanctioning powers.[197]

---

[192] Steven Shavell, "The Social versus the Private Incentive to Bring Suit in a Costly Legal System", 11 J. of Leg. Stud., 1982, p.333, 334; Steven Shavell, "The Fundamental Divergence between the Private and the Social Motive to Use the Legal System", 26 J. of Leg. Stud.575, 1997, p. 581-584.
[193] Wils, "The Optimal Enforcement of EC Antitrust Law: Essays in Law & Economics", Kluwer Law International, 2002 p. 150; Frank H. Easterbrook, "Detrebling Antitrust Damages", 28 J. of L. & Econ. 445, 1985, p 452.
[194] Wils, supra note 115, p.482.
[195] William H. Page, supra note 133, pp. 4 - 9.
[196] Wils, supra note 115, p.482.
[197] Ibid., pp.480-482.

1.4.3 Ways to Achieve Optimal Enforcement of Competition Law

Optimal competition enforcement could be achieved by various substantive and procedural law provisions. The choice between either methods of enforcement depends largely on how much value society generally attaches to the goals of competition enforcement and on how many degrees of either compliance or corrective justice is worth the additional costs.[198] Legislatures could influence the returns to enforcement expenses by determining the rules of substance and procedure.[199]

The optimal amount of enforcement depends on the cost of punishment and the responses of infringers to changes in enforcement.[200] To achieve optimal enforcement, the infringer's expected penalty at the time he commits the infringement must correspond to the amount of damage caused by his infringement.[201] However, it has been argued that it is generally impossible for private litigation to achieve the optimal combination of penalty and probability of detection because a change in penalty will also change the returns of enforcement and the probability of detection, apprehension, and conviction.[202] Therefore, policymakers concerned with enforcement mechanisms must balance the present plaintiff's incentives to pursue litigation and the future defendant's incentives to take precautions.[203]

In respect to optimal enforcement, I propose to discuss two widely cited models. Under one model, the way to achieve optimal enforcement for competition

---

[198] Ibid., p.487.
[199] Richard A. Posner, supra note 98, p. 581.
[200] Becker, supra note 190, p. 169
[201] See Becker, supra note 190, pp.176-179, 180- 185, 191-193; See also, R. Posner, supra note 98, p. 221-224 : Robert H. Landes, supra note 184. The text implies that a system of penalties could achieve equal deterrence at lower cost by imposing higher penalties while devoting fewer resources to detection and prosecution. To the extent managers are risk-averse, however, any savings through reform in this direction would be at least partially offset by increased costs of risk-bearing on potential offenders. See Polinsky & Shavell, "The Optimal Tradeoff Between the Probability and Magnitude of Fines", 69 AM. ECON.880, 1979, 880-881. The possibility of judicial error would magnify these costs. See J. G. Sidak and M. Block, "The Cost of Antitrust Deterrence: Why Not Hang a Price-Fixer Now and Then?", 68 GEO. L.J 1131, 1980, p.1135-1138.
[202] Polinsky, supra note 189, p.1234 .
[203] Xinyu Hua and Kathryn E. Spier, "Information and Externalities in Sequential Litigation", 161 J. of *Institutional and Theoretical Econ.*, 2005, p.215; Robert McNary, supra note 182, p. 12; Patricia Hanh Rosochowicz, supra note 61, p.1.

infringements is the "net harm to persons other than the infringer" multiplied by the reciprocal of the probability of detection.[204] The net harm includes the allocative inefficiency which comes from the deadweight loss welfare triangle.[205] Under this model multiplication, as discussed in Chapter 3, it is essential to create optimal incentives for would-be infringers when unlawful acts are not certain to be prosecuted successfully.[206] It would be possible, to set damages multiples based on the likelihood that anticompetitive infringements will be detected and successfully prosecuted. This could counteract the intended trade-off between a high-penalty and a low-probability of detection.[207] The multiplier used in calculating anticompetitive damages should be larger than one because not all infringements are detected and proven.[208] If the probability of detection were 25%, the multiplier would be 4. If the probability of detection were 10%, the multiplier would be 10.

For example, in the case of price fixing, if the likelihood of detection is one-third, the optimal enforcement would be three times the sum of the overcharge and the deadweight loss. It could be argued that the trebling factor in private antitrust cases serves this function, imperfectly, in the US.[209]

In respect of optimal enforcement it seems to be reasonable to balance a low probability of discovering anticompetitive conduct with the risk of higher damages.[210] Therefore, it can be submitted that if positive enforcement costs and probability of apprehension and conviction were less than one (100%), the optimal enforcement equals the net harm, including enforcement costs, divided by the

---

[204] W. M. Landes, supra note 184, p. 657; See also Robert H. Lande, Why Antitrust Damage Levels Should Be Raised, 16 Loy. Consumer L. Rev. 329, 2004 (observing that the Landes model of optimal deterrence "is almost universally accepted, even by those who are not of a Chicago School orientation"); See generally, William H. Page, "Antitrust Damages and Economic Efficiency: An Approach to Antitrust Injury", 47 U. Chi. L. Rev. 467, 1980; William H. Page, supra note 133, p.5.

[205] 'Deadweight loss' is the loss to plaintiffs arising out of their inability to buy the product due to its artificially high price. For example, a plaintiff might lose the opportunity to profit from a downstream sale. P. Friedman, D. Gelfand et al., supra note 155, p.23; Robert H. Lande, "The rise and (Coming) Fall of Efficiency as the Ruler of Antitrust, 33 Antitrust BULL. 429, 1988, p.433-434.

[206] Frank H. Easterbrook, supra note 193, p.455.

[207] Ibid.

[208] Edward P. Henneberry, supra note 118, p. 335.

[209] See generally these three articles. Frank H.Easterbrook, supra note 121, p.329-331; Frank H.Easterbrook, supra note 193 ; Frank H.Easterbrook and Fischel, "Antitrust Suits by Targets of Tender Offers", 80 MICH. L. 1155,1982.

[210] Ulf Boge, Konrad Ost, supra note 111, p.201.

probability of apprehension and punishment.[211]

Under the other widely cited model, competition enforcement must strive to equalize marginal cost and marginal benefit. Conceivably, government or the private sector could achieve one hundred percent enforcement, but this is undesirable.[212] One hundred percent enforcement results in allocative inefficiency because resources allocated to enforcement do not produce an equivalent societal benefit.

For example, if the government and private sector must spend £1,000 to apprehend an infringer inflicting £10 of harm on competition, then the cost of enforcement far exceeds its benefits. A better alternative would be to invest resources in enforcement only to the point at which marginal cost of enforcement equals resulting marginal benefit. For example, if society spends £1,000 to apprehend infringers inflicting £1,000 of harm to competition, but only achieves eighty-percent enforcement, eighty-percent enforcement would be society's optimal enforcement level.

This model concludes, therefore, that for claims which do not have positive net social benefits, if the increase in deterrence from allowing private or public enforcement would be outweighed by the direct costs of litigation then that enforcement should be denied. It is then efficient for society to adopt legal rules that discourage litigation. [213] Furthermore, where the practice has no anticompetitive effects, it is an efficient offence,[214] and the optimal enforcement would be zero.[215]

---

[211] Warren F. Schwartz, "An Overview of the Economics of Antitrust Enforcement", 68 Geo. L. J. 1075, 1980, pp. 1083-1085

[212] See K. Elzinga and W. Breit, The Antitrust Penalties: A Study In Law And Economics", Yale University Press, 1976, p. 15.

[213] Louis Kaplow, supra note 187, pp. 371, 374.

[214] See K. Elzinga and W. Breit, "Private Antitrust Enforcement: The New Learning", 28 J.L. & ECON., 1985, p. 405; Note, "Rethinking Antitrust Damages", 33 STAN. L. Rev. 329 (1981); Easterbrook, supra note 193, p. 410-12; Easterbrook & Fischel, supra note 209, p.1155; W.M.Landes, supra note 184 . See R. Posner and F. Easterbrook, "Antitrust: Cases, Economics And Other Materials", (2d ed), 1981.p. 545-572

[215] See Sidak and Block, supra note 201, p. 1132 (the solution to the enforcement-cost problem appears to be straightforward: 'Lumber for gallows is relatively inexpensive, and few offenders would actually be hanged; thus the cost of enforcing the antitrust laws would be trivial.'). Block and Sidak agree that enforcement should proceed to the point where marginal cost equals marginal benefit. They make several economic arguments that it may not be optimal to continuously trade higher fines for lower enforcement

1.4.4 Optimal Enforcement with Public and Private Enforcement

1.4.4.1 Are Public and Private Enforcement complementary or conflicting?

The pairing of public and private enforcement is not unique to the competition laws. However, it is important to ensure that the private party's interests in deciding to bring actions are aligned with, or at least take account of, society's interests.[216] In respect of competition law it is claimed that private enforcement is not always aligned with the objectives of competition law.[217] To achieve the objectives of competition law, it is important to optimize the level of law enforcement from the joint investments and efforts of the public and private enforcers.[218]

One the one hand, public enforcement pursues the public interest such as the protection of the competition and consumer welfare through administrative or criminal sanctions.[219] Public enforcement agencies normally have the power to impose fines and penalties, even though they cannot bring actions for damages on behalf of private parties.[220] It is often said that competition authorities are better suited than individuals to safeguard the public interest because the results achieved by individuals in their own interests are not necessarily also in the public interest.[221]

---

costs. ; K. Elzinga and W. Breit, supra note 212, p. 15

[216] William E. Kovacic, "Private Participation in the Enforcement of Public Competition Laws", British Institution of International & Comparative Law- Third Annual Conference on International and Comparative Competition Law: The Transatlantic Antitrust, 2003, p. 3; Elena Wind, "Remedies and Sanctions in Article 82 of the EC Treaty", ECLR, 2005, p. 664-668.

[217] Cooter and Ulen, Law and Economics (4th ed., Pearson Addison Wesley, Boston, 2004), p. 476; Wils, supra note 115, p. 482.

[218] David Resenberg and James P. Sullivan, "Coordinating Private Class Action and Public Agency Enforcement of Antitrust Law", Journal of Competition Law and Economics, 2006, p.9.

[219] Ilya Segal, Michael Whinston, "Public VS Private Enforcement of Antitrust Law: A Survey", ECLR, 2007, p. 306-312.

[220] See Mario Monti(former European Commissioner for Competition Policy), "Effective Private Enforcement of EC Antitrust Law", Speech at the 6th EU Competition Law and Policy Workshop, Speech/01/258, 2001. available at http://europa.eu.int/rapid/start/cgi/guesten.ksh?p_ action.gettxtgt.doc EN.

[221] Ulf Boge, Konrad Ost, supra note 111, p.198; See generally, Peter S. Menell, "A Note on Private Versus Social Incentives to Sue in a Costly Legal System", 12 J.Legal Stud.41, 1983.

On the other hand, private enforcement pursues the private interest through civil sanctions, most notably through damages actions.[222] Private enforcers are primarily pursuing compensation to recover or prevent losses and are motivated by monetary objectives.[223] Private enforcement is therefore profit-motivated and lacks any incentive to maximize social over private benefit.[224] These incentives may lead some private plaintiffs to engage in unmeritorious actions. Hence, it is claimed that there is a risk that a private party's motive may either fall short or exceed the socially adequate motive.[225] For example, seeking settlement from can cause substantial litigation costs and potential bad publicity associated with defending even non-meritorious claims to defendants.[226] As American experience indicates, private plaintiffs do not consider the public interest in their decision to bring actions, and have strong incentives to exploit antitrust actions to disadvantage larger rivals.[227]

Private parties will normally, of course, be less sensitive than government agencies to the economical and social costs of particular enforcement actions, such as its disruptive impact on affected communities, relative to the social benefits of such actions.[228]

It is argued that the existence of private actions, however, in particular the availability of damages actions to the victim of anticompetitive conducts, is consistent with the public interests that are inherent in competition norms.[229] In

---

[222] See Braakman, 'The Application of the Modernized Rules Implementing Articles 81 and 82 EC Treaty in Injunction Proceedings: Problems and Possible Solutions", in: Hawk (Ed.), international Antitrust Law and Polin' 1999, Annual Proceedings of the Fordham Corporate Law Institute, 2000, p. 161; See Shaw Jo, "Decentralization and Law Enforcement in EC Competition Law", 15 LS 128.1995, p. 158-159. In this article, he stated that "Private actions will generally be favoured where competition is seen primarily as a private, market-based matter, with competition policy being correspondingly limited in scope. They will tend to be discouraged where competition policy implies the existence of some elements of public interest in the maintenance of a particular type of trading structure".

[223] Commission Staff Working Paper accompanying the White Paper, supra note 118, p. 11; Ulf Boge, Konrad Ost, supra note 111, p.198; Steven Shavell, "The Optimal Structure of Law Enforcement" 36 Journal of Law and Economics 255, 1993, p. 268.

[224] D. Resenberg and J. P. Sullivan, supra note 218, p.4.

[225] S. Shavell, supra note 223

[226] M. C. Stephenson, supra note 120, p.116.

[227] William H. Page, supra note 133, p.10.

[228] Matthew C. Stephenson, "Public Regulation of Private Enforcement: The Case for Expanding the Role of Administrative Agencies", 91 Va.L.Rev. 93, 2005, p.115-117.

[229] Assimakis P. Komninos, supra note 159, p.15.

respect to the interaction between public and private enforcement, private enforcement cannot be treated as an isolated issue because it is an integral part of the system and has to be seen in its interaction with public law enforcement.[230]

The key question is how both public enforcers and private enforcers could ensure optimal balance between private and public enforcement. Competition enforcement has been described as a public good which does not necessarily need to be provided for by government, but can be efficiently produced by relying on the private incentives.[231] It can therefore be argued that an effective system of private enforcement does not alter the basic goal of the competition rules, which is to safeguard the public interest in maintaining free and undistorted competition.[232] The existence of private actions is consistent with the public interest that is inherent in competition norm. Private claims for damages caused by competition infringements provide a complement for public enforcement, but the goals of both enforcement devices might not be common, as they protect different interests.[233] To ensure optimal balance between private and public enforcement, private enforcement and public enforcement should work alongside, and in harmony with, each other to the best effect for consumers and for the economy.[234] Pursuing private interests at the expense of public interests[235] should not be allowed. A balance must be struck between giving way to substantial competition enforcement and maintaining the probable degree of legal certainty and protection of rights of parties having suffered damage from anticompetitive conducts.

For instance, the Court of Justice of the EU, has recognised that private actions strengthen the working of the Community competition rules and discourage anticompetitive conduct restricting or distorting competition.[236] This view sees private enforcement as making a significant contribution to the safeguarding of the

---

[230] ESBG, "ESBG comments on the EC White Paper on Damages actions for breach of the EC antitrust rules", Position Paper, 2008, p.2.
[231] Robert McNary, supra note 182, p.16.
[232] Komninos, supra note 143, p.15; R. Becker et al., supra note 157, p.5; D. Resenberg and J. P. Sullivan, supra note 218, p.4.
[233] Francisco Marcos et al., supra note 143, p. 7
[234] OFT916, supra note 37, pp.4-5; David Resenberg and James P. Sullivan, supra note 218, p.4.
[235] According to DGFT, was the previous name for the UK OFT, the definition of public interest is consumer wellbeing; Mark Furse, supra note 44, p.257.
[236] *Courage v Crehan*, C-452/99, [2001]ECR I-6297, para 27.

public interest.

Furthermore, the EU Competition Commissioner has stated that the key role played by public competition enforcement is not weakened by private enforcement. She considers that more private enforcement does not necessarily equal less public enforcement.[237] Rather, private enforcement is by nature complementary to and can even strengthen the enforcement actions taken by competition authorities.

It should be noted that EC Regulation 1/2003[238] (the Modernisation Regulation) encourages the complementary roles of public and private enforcement in the EU by providing for national courts to apply Articles 81 and 82 in full.[239]

Therefore, there needs to be a mutually fruitful interaction between private and public enforcers.[240] Neither public enforcement nor private enforcement can replace the other,[241] but they can continue to support each other. To ensure competition and to protect consumers' interests the private enforcement system should therefore be evaluated in terms of how successfully it helps to implement public interests without unreasonably deterring legitimate business conducts or unnecessarily burdening the judicial system. In other words, the substantial question is how efficient it is likely to be in helping to deter and prohibit anticompetitive conduct, while providing a fair and efficient way of compensating victims.

Furthermore, the growth of private enforcement can be facilitated by assistance from public enforcers.[242] Obvious examples of such assistance are follow-on actions.[243] The involvement of the competition authorities in the private enforcement process will strengthen the impact of the rules, and the private parties

---

[237] Neelie Kroes. "Enhancing Actions for Damages for Breach of Competition Rules in Europe", Dinner Speech at the Harvard Club, Speech/05/533, New York, 2005, p.3.
[238] Regulation 1/2003 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty [2003] OJ L1/1.
[239] Arundel McDougall and Alexandra Verzariu, "Vitamins Litigation: Unavailability of Exemplary Damages, Restitutionary Damages and Account of Profits in Private Competition Law Claims", ECLR, 29(3), 2008, p.181.
[240] Barry Rodger, "Private Enforcement of Competition Law, The Hidden Story : Competition Litigation Settlements in the United Kingdom, 2000-2005", E.C.L.R.29(2), 2008, p.98.
[241] T. J. Muris, supra note 44, p.170; Ulf Boge, Konrad Ost, supra note 111, p.198.
[242] Dan Wilsher, supra note 142, p. 28.
[243] See section 1.3.1.4 which deals with follow-on and stand-alone actions.

such as consumers will have more inclination to invoke the competition law provisions.[244] For competition authorities, the issue is how to strike the right balance between pursuing their own policy goals in the public interest and private parties' interests.[245] Securing the right balance between 'nature' of private enforcement and 'policy independence' of public enforcers may be difficult because of differences of objectives between public enforcement and private enforcement.[246] Public enforcers therefore need to map out their broader policy goals and justify levels of assistance or non-assistance to private parties.[247] This leads to the conclusion that competition authorities need strong and clear guidelines on when and how they cooperate with private parties. This involves a full consideration of an assessment of the merits of private and public enforcement.

1.4.4.2 Two Elements for Optimal Enforcement through Public and Private Enforcers

As stressed above, to achieve optimal enforcement through private and public enforcement, the balance to be reached is very important. It is important to choose the most appropriate enforcer to achieve the objectives of competition law. It is desirable to give enough incentives to private enforcement but at the same time frivolous lawsuit should be avoided.[248] There are two main elements to be considered.

The first element is access to relevant information for the enforcement.[249] Relevant information is important to a fairer and more correct outcome. The choice between private and public enforcement depends to a large extent on the effort needed to get the necessary information.[250] To attain optimal enforcement, an efficient enforcer should have ready access to the evidence necessary to prove the infringement. Otherwise, an extensive amount of effort may be needed to establish

---

244 M. Monti's speech/01/258, supra note 220.
245 Dan Wilsher, supra note 142, p. 28.
246 Ibid.
247 Ibid., p. 27.
248 Patricia Hanh Rosochowicz, supra note 61, p.5.
249 See, Wils, supra note 193, p.18; See generally, Maarten Pieter Schinkel and Jan Tuinstra, "Imperfect Antitrust Enforcement", Maastricht University research paper , 2002.
250 P. Friedman, D. Gelfand et al., supra note 155, pp.5-11.

the find the infringement.[251]

On the one hand, private parties may more easily obtain relevant information because the victim of harm usually finds himself in the best position to gather the relevant information by identifying the infringer and infringement. On the other hand, public enforcement may have lower information gathering costs when the public authority is better situated to acquire information.[252] Where public enforcers are better situated than private enforcers is situations where harms are so widely dispersed that it is not cost-effective for all of the harmed individuals to share information. Economies of scale in information processing can therefore make public enforcement more cost-effective than private enforcement. Private parties do not have the same investigatory powers as authorities and are not necessarily in a position to spend considerable amounts of money on expert opinions and econometrics studies.

For instance, it is difficult to uncover hardcore horizontal cartels. Private parties are hardly in a position to detect such practices without expending a great degree of effort in uncovering them. In this case enforcement requires a public authority with access to more effective techniques. This could be certain information systems such as databases, whose benefits would be hard to be captured if used by private parties alone.[253] Sometimes, it could require that huge degree of co-ordination between a number of individuals or bodies. Information sharing affects the costs and benefits of enforcement.[254]

The second element is that which enforcement is preferred, the more efficient enforcers must carry out enforcement. It is argued that whatever scheme is eventually preferred, to achieve optimal enforcement, the efficient enforcers must have the greatest incentive to bring actions.[255] The comparative effectiveness of public or private enforcement depends on the difference in enforcement costs

---

[251] M. Monti's speech/04/403, supra note 118, p.2.
[252] See generally, Antonio Capobianco,Wilmer Cutler, Pickering Hale and Dorr LLP,"Private antitrust enforcement of EC competition rules: recent developments" CLI 25(3), 2004, p.6.
[253] See generally, Steven Shavell, supra note 223.
[254] Robert McNary, supra note 182, p. 14-15.
[255] Steven Shavell, "The Fundamental Divergence between the Private and the Social Motive to Use the Legal System", 26 J. of Leg. Stud.575, 1997, p. 611.

between public and private enforcement.[256] Both public and private enforcement involve certain administrative costs, for example caused by making use of either competition authorities or courts, but also other expenses such as lawyer's fees and the time dedicated to each case. [257] The most efficient enforcer can be described as the one who can bring actions for the lowest direct and indirect costs. Private enforcement could be more costly than public enforcement because of legal costs and social dead weight.[258] However, even if it is correct, therefore, that public enforcement should remain the dominant element in an optimal enforcement scheme, it still makes sense to rely additionally on the initiative of private parties because it is highly probable that public enforcers do not have sufficient resources to achieve optimal enforcement.[259] Follow-on actions can help the balance between public and private enforcement by encouraging private actions through allowing reliance on prior guilty verdicts by public enforcers.[260]

1.5 Conclusion

This Introduction has introduced the concepts of public and private enforcement of competition law and argued that optimal enforcement can best be achieved when both the possible harm as well as possible benefits of each method of enforcement is taken into account.

However, it appears undesirable for enforcement rules to exclusively rely either on public or private enforcement. Optimal enforcement can be achieved through efficient and effective cooperation between public and private enforcement. Both private enforcement and public enforcement can strengthen the impact of competition rules. These forms of enforcement are complementary and necessary

---

[256] A. Mitchell Polinsky, "Private Versus Public Enforcement of Fines", 9 J. Leg. Stud. p. 105, 107 (1980). See also, Polinsky and Shavell, supra note 201, p. 880.
[257] Wils, supra note 115, p. 480
[258] First of all because of the effort needed to estimate the damages attributable to anticompetitive conduct, but also as private lawsuits often tend to be prohibitively expensive, at least in comparison to costs expended by competition authorities.; Christian Diemer, supra note 160, p. 313; see Wils, supra note 115, pp. 480-484. ; Clifford A. Jones, "Private Antitrust Enforcement in Europe: A Policy Analysis and Reality Check", 27 World Competition 13, 2004; also in Is. Atansiu, C.D. Ehlermann, European Competition Law Annual 2001. Effective Private Enforcement of EC Antitrust Law (Hart Publishing),2003.
[259] Dan Wilsher, supra note 142, p. 28.
[260] See Thomas E. Kauper & Edward A. Snyder, supra note 154.

for the effectiveness of the whole competition law enforcement.[261] Although private enforcement and public enforcement aim at different aspects of the same phenomenon each of the two systems must work in a complementary manner and be effectively coordinated. Private enforcement can positively contribute to optimal enforcement, even though public enforcement remains of critical importance not only for the ability to detect anti-competitive practices, but also in view of the costs.

One view is that the primary function of the private enforcement is the compensatory one and that the deterrent function must be considered secondary since private competition enforcement through damages actions is virtually the only way that victims of anticompetitive conduct can obtain redress.[262] This combined enforcement system of private and public enforcers would bring the implementation of competition law closer to consumers and business. In this combined enforcement system the victims of anticompetitive practices, including consumers, could have the opportunity to avail themselves of effective remedies in order to protect their rights ensured by competition law. Therefore, competition law should ensure a fine balance between public and private enforcement and aim at facilitating private actions with appropriate incentives. It should be also worked within the enforcement system and available enforcement resources. I explore in the subsequent chapters various matters which have to be addressed if optimal enforcement is to be achieved.

---

[261] Paolo Giudici, "Private Antitrust Law Enforcement in Italy", Competition Law Review, 2004 p. 64-65.; See Behrens, "Comments on *Josef Drexl:* Choosing between Supranational and International Law Principles of Enforcement", in: Drexl (Ed.), *The Future of Transnational Antitrust - From Comparative to Common Competition Law* (Berne/The Hague/London/New York, 2003, p. 344-345.

[262] Francisco Marcos et al., supra note 143, p. 9 ; Komninos, supra note 143, p.9; R. H. Lande and J. P. Davis, supra note 141, p.904.

Chapter 2. Overview of Private Enforcement of Competition law in Korea, the EU, UK and US

2.1 Overview of Private Competition Enforcement in Korea

2.1.1 Competition Culture and Private Competition Enforcement

2.1.1.1 Importance of Competition in Korea

From 1970 to 2009, for almost 39 years, the Republic of Korea (hereafter, Korea) has developed a competition culture, which has contributed to a sound and strong economy.[1] Unrestrained competition has made great economic development possible in Korea.[2] Competition has generated investment, efficiency and innovation. Through competition, companies have innovated and made the most effective use of their resources, pushed up quality, pushed down prices and ensured new companies have access to the market. Competition has been exceptionally important in high-tech industries where rapid progress has occurred through the introduction of new technologies. Competition has been beneficial to consumers' interests because competition has offered lower prices and better choices to consumers. Consumers and businesses have supported the principles of the competition laws by detecting anticompetitive conduct and reporting anticompetitive conduct to the KFTC. This support has helped to build the culture of competition.

2.1.1.2 Competition Culture and Competitive Industry

Korea therefore has a competition culture and competitive industry.[3] The

---

[1] "Recent Development in Korea's Competition Laws and Policies", Principle of KFTC Policy, 2007.1.26, p. 1.
[2] "Recent Development in Korea's Competition Laws and Policies" by Chairman Ohseung Kwon of the Korea Fair Trade Commission, 2006.5.18, p. 3;"Establishing Market Economy and Competition Policy in Korea" by former Chairman Chul-Kyu Kang of the Korea Fair Trade Commission, 2004.10.29, p. 3.
[3] See generally, "Economic Reform in Korea: Past Progress and Future Challenges", OECD's perspective to Korea Policy, 2007, p. 17-29.

economy of Korea was the 14th largest in the world in 2007.[4] In the 1940s, Korea was an agricultural economy. Since 1960, the Korean government has carried out extensive financial reforms that have restored stability to markets. Owing to these extensive financial reforms, since 1970, the Korean economy developed fast as it moved away from the centrally planned, government-directed investment system toward a more market-oriented one based on 'fair competition.'[5] Ensuring competition is, of course, more important to market-oriented industry than to government-directed industry. Thus, for 39 years the Competition Law has played crucial role in doing that. In the first three decades after the Park Chung Hee government launched the First Five-Year Economic Development Plan in 1962, the Korean economy grew enormously and the economic structure was radically transformed. Korea's real gross national product (hereafter, GNP) was expanded in the years 1960~2002 by an average of more than 10% per year. The economic growth pushed by President Dae-jung Kim helped Korea maintain one of world's expanding economies. Increasing trade with the People's Republic of China (hereafter, China) has boosted Korea to a leading position among the world's developed economies.[6]

To understand the economic development of Korea over the last sixty years, it is necessary to understand its competition culture. The culture of competition has played a major role in shaping and developing competitive companies and the relationships among market participants by prohibiting conduct that unreasonably restricts or distorts competition in markets.[7]

Korean companies have become very competitive because they have faced fierce competition in the domestic market. Only competitive companies can survive

---

[4] This GDP (Gross Domestic Product) includes the value of all final goods and services produced within a nation in a given year. The GDP dollars are calculated at market or government official exchange rates and includes data for the year 2007 for all 180 members of the International Monetary Fund. Data are in millions of current United States dollars. 1st, United States : 13,807,550 millions ...14th, Korea: 969,871 millions. "World Economic Outlook Database", IMF, September 2007.

[5] In respect to the definition of 'fair competition', see section 1.2.2 which deals with objectives of competition law.

[6] 2008 Annual Report, Korea Industry organization, 2009, p.39

[7] See generally, "Recent Development in Korea's Competition Laws and Policies", KFTC, 2007; "Recent Development in Korea's Competition Laws and Policies" by former Chairman Ohseung Kwon of the Korea Fair Trade Commission, 2006.5.18 p. 3; "Establishing Market Economy and Competition Policy in Korea" by former Chairman Chul-Kyu Kang of the Korea Fair Trade Commission, 2004.10.29, p. 3.

in such a market and once they survive in Korea, they can normally also survive in world markets. For example, Samsung was among the top 21 Global brands in 2007.[8] Samsung has invested heavily in the quality, design, manufacturing, and long-term research of its products to survive in related industry. Another example is Hyundai Motor Group which in the top 72 Global brands in 2007.[9] LG is also a good example of a company which has flourished through competition. LG was in the top 97 Global brands in 2007.[10]

According to the former Prime Minister of Korea, Soong- Su Han, competition is one of the most important factors in developing the Korea economy.[11] Yong-Ho, Baek, the former Chairman of the KFTC, states that free and fair competition is a powerful engine of growth for the Korean economy.[12] Given the above, it is submitted that the success of the Korean economy can largely be attributed to its culture of competition.

2.1.1.3 The Competition Law System and Private and Public Competition Enforcement in Korea

In Korea, to regulate anticompetitive conduct there is the Monopoly Regulation and Fair Trade Law (hereafter, Competition Law). The Competition Law was enacted on April 1, 1981 as a comprehensive charter of economic liberty aimed at preserving free and unfettered competition as the rule of trade.[13] Besides Competition Law, to ensure competition and protect consumer interests, 9 laws are have been enacted. These 9 laws are Fair Subcontract Transactions Law (1984),

---

[8] Business Week online: Top 100 Global brands interactive Table http://bwnt.business week.com/brand / 2007.
[9] Ibid.
[10] Ibid.
[11] Congratulatory Speech by the Prime Minister at 5th Seoul Competition Forum, 2008.
[12] 2009 KFTC Annual Report, 2009, p.8.
[13] The Price Stability and Fair Trade Law produced side-effects such as restricting the proper functioning of price mechanism, since the focus of the law enforcement was primarily on achieving price stability. The price authorization by the government distorted the market function and prompted the public to expect inflation in the future, resulting in the avoidance of production, creation of double prices, and cornering and hoarding. Focusing on the regulations of the side-effects arising from monopoly and oligopoly deepened the problem of monopolization. The lack of a mechanism curbing the concentration of economic power gave rise to the problem of economic concentration. For the private sector to play the lead, instead of the government, in the operation of the economy, the sections involving fair trade were separated from those on price stability under the Price Stability and Fair Trade Act.

Fair Franchiser Actions Law (1984), Adhesion Contracts Law (1986), Instalment Transactions Law (1991), Door-to-Door Sales, Etc. Law (1995), Fair Labelling and Advertising Law (1999), Omnibus Cartel Repeal Law (1999), Consumer Protection Law on Electronic Transaction (2002) and Consumer Fundamental Law (2006). These laws are closely related to private enforcement because these laws protect not only public interests such as competition but also private interests protected by these laws. Furthermore, although the KFTC has exclusive jurisdiction to enforce these laws, it cannot compensate for damages caused by the anticompetitive conduct. To be compensated for damages, private parties should bring damages actions before courts.

In recent years, much attention has been given in Korea to the role of private as well as public enforcement of competition law. Private enforcement has been introduced and recognized as an important way to ensure that the competition rules are applied. There have been many changes aimed at facilitating private competition law actions, not only for the benefit of individual interests but also for effective cooperation between public enforcement and private enforcement. The positive effects of private enforcement have been promoted and strengthened.

Private enforcement is regularly invoked as a sword, but rarely used as a shield. Except in the case of a cartel, conduct infringing competition law is not void and does not remove contractual obligations. Competition Law 19(4) states that "Any contract ... stipulating the improper cartels listed in Clause (1) between enterprisers shall be null and void." Therefore, except for cartel cases, private enforcement is usually used as a sword, to bring actions for damages. [14] This also means that in Korean law no issue has arisen about restitution of benefits which have passed between co-contractors to an illegal contract.

The right to bring damages actions for loss suffered due to anticompetitive conduct has existed since 1981. Korean competition law creates individual rights that the courts are required to protect. The general principle of remedies under the Competition Law is to provide for the full compensation for damage caused by

[14] See section 1.3.1 which deals with the sword/shield terminology is explained.

anticompetitive conduct.[15]

Competition Law 56 states that:

"Anyone who causes damage, through breach of Competition Law, to another person in whatever capacity or participates in bringing about such a infringement, is liable to make full compensation for the injured person or persons in accordance with the provision set forth in the Competition Law."

However, to date private action has been very limited. In particular, there have been few damages actions. Private enforcement has not performed an important failsafe function. Public enforcement far exceeds private enforcement. There has been a general reluctance by wronged parties to bring such actions. There had been 31 cases of private enforcement in the 20 years up to 2003.[16] Generally speaking, most people would prefer to avoid becoming involved in legal actions. Substantial costs and lengthy court procedures have led to the considerable unwillingness of private parties to try to seek compensation through litigation. Public enforcement has therefore exceeded private enforcement by a factor of approximately ten to one or more. There is a general impression that public enforcement is the primary method of enforcing competition law.

Furthermore, legal culture and tradition have been barriers to litigation in Korea because trust and honour in business relations is important. Business activities are based on an individual truthfulness and personal character. Business activities are able to be done well with good relationship with their business partners. Securing favourable relationship with their business partners is more important to potential plaintiffs than getting compensation for damages caused by anticompetitive practice. If there is any possibility to ruin their relationship by bringing actions, potential plaintiffs would not bring actions.[17]

---

[15] Competition Law is a law for all who are subject to the market as players. Anyone has juridical standing to the extent to which he/she can claim a specific damage deriving from the breach of competition law".

[16] Hong Dae-Sik, "Damages Claim under the Korean Antitrust Law - From the perspective of practice-", 13(2) Journal of Business Administration and Law 245, 2003, p. 248

[17] In respect to Korea legal culture, see generally, Yang Kun, "Law and Society Studies in Korea: Beyond the Hahm Theses", Law & Society Review, Volume 23, Number 5, 1989; See also generally, Yang Kun, "The Sociology of Law in Korea", The American Sociologist/Summer 2001.

In reality, legal or natural persons usually use the Korea Fair Trade Commission (hereafter, KFTC) to achieve their objectives in the competition field. As a matter of fact, making a complaint to the KFTC is easier and more convenient for private parties than commencing damages actions before the courts because the parties can avoid substantial legal costs and lengthy procedures. Generally, the KFTC can handle the case faster than private parties. The most crucial instrument against anticompetitive conduct is the power of the KFTC to bring the infringement to an end and to impose a substantial surcharge[18] on the undertakings or associations of undertakings responsible. An economic sanction such as surcharge is efficient to ensure compliance because it is substantial. The principle of proportionality provides that sanctions imposed should not be excessive in relation to the breach.[19]

In respect to the limited incidence of private enforcement, it is not only a question of eliminating psychological barriers. Compared with the US, there are numerous reasons why private enforcement of competition law remains underdeveloped in Korea. Korea is a more difficult jurisdiction for plaintiffs in competition actions than is the US. The mechanism of US private enforcement contains government-directed strong incentives for plaintiffs, such as treble damages, the one-way costs rule, and broad discovery powers for those seeking damages for infringements of competition law.[20] Moreover, the legal traditions of Korea and the US differ in that Korea is generally considered to have a less litigious culture than the US. Korea does not have the culture or tradition of bringing cases to court. For instance, Korea has a loser-pay rule, no discovery rules and no opt-out representative actions. Comparing the number of complaint to the KFTC with the number of actions before courts, it is submitted that Koreans are not litigation-oriented. According to the KFTC's 2008 statistics report, the number of complaints to the KFTC in 2008 is about 13,000 and the number of actions before courts in 2008 is 120.[21]

---

[18] In Korea, fined imposed by the KFTC is called as surcharge because fine could be imposed with only corrective order of the KFTC.
[19] See, KFTC, "Guild line for Imposition of Surcharge," 2007, sections III and IV.
[20] See section 2.4 which deals with features of the US system.
[21] See Statistic Report 2009 by the KFTC

However, given the limited resources of public enforcers to investigate and prosecute every single infringement of competition rules, it is considered that it is desirable to encourage private enforcement. In order to encourage private damages actions, the KFTC removed obstacles and created incentives by revising the provision made for damages actions for breach of the competition rules in 2004.[22] Under that revision private parties can bring damages actions before District Courts without a prior decision of illegality by the KFTC (i.e. plaintiffs can bring 'standalone' and not just 'follow-on' actions).[23] The revised damages procedure could encourage private enforcement, which places a significant further burden on companies that infringe competition law. Businesses face not only the prospect of a substantial surcharge from the KFTC, which can run to hundreds of millions of Won,[24] but also the possibility of private actions which can run to billions of Won in damages.[25] It is now generally recognised that private competition enforcement is an important complement to public law enforcement.

However, it cannot be expected that private enforcement will play an important role in Korea immediately, if at all. In the US, the Sherman and the Clayton Acts were hardly used during their first decades of existence and needed nearly half a century to become commonly used. An analysis of the first fifty years of private enforcement in the US revealed that between 1890 and 1940 in total only 175 private damages actions had been brought before courts with plaintiffs prevailing in only 13 reported decisions.[26] Since 1960, private antitrust litigation has outpaced public enforcement efforts by a wide margin because of the opt-out system.[27] In the US, 90 % of competition cases were private actions in 2004.[28]

---

[22] Competition Law 56(3)
[23] See section 1.3.1.4 which defines the concept of stand-alone and follow on actions.
[24] Won is the Korean currency. Its ration of exchange to pound is that one pound sterling is about 2,063Won in September 7, 2009.
[25] Group actions have been brought before court since 2007 because of the provision of group actions in Consumer Fundamental Act. Group actions are important to encourage private enforcement because damage of individual parties is so small and dispersed. Without group actions mechanism, individuals would hardly ever bring actions before courts. In respect to group actions, see section 6.1.1 which deals with group action..
[26] Clifford A.Jones, "Private Enforcement in the EU, UK and USA", Oxford, 1999, p.79. Clifford A.Jones states that the average number of new private actions since 1985 is in the range of 600 to 1,000 per year.
[27] Ibid., p.79. See infra Chapter 6 which deals with opt-out system of group actions.
[28] See Holmes. K, "Public Enforcement or Private Enforcement? Enforcement of Competition Law in the

2.1.2 Public Competition Enforcement System in Korea

The KFTC is the only public competition enforcers in Korea. Thus, to understand public competition enforcement system in Korea, it is necessary to discuss characteristics and role of the KFTC.

2.1.2.1 Organization and Role of the KFTC

2.1.2. 2. 1 Organization of the KFTC

In 1981, the KFTC was established within the Economic Planning Board[29] pursuant to the Competition Law as a working body.[30] To guarantee procedural fairness, the KFTC was established as an independent, professional and impartial government body. At present, the KFTC is a ministerial-level central administrative organization under the authority of the Prime Minister. The KFTC consists of a committee (the decision-making body) and a secretariat (a working body). The committee consists of nine commissioners, who deliberate and make decisions on competition and consumer protection issues. The Chairman and Vice-Chairman are recommended by the Prime Minister and appointed by the President, while other Commissioners are recommended by the Chairman and appointed by the President.[31] The term of office of the commissioners is three years. Regional Offices operate in Seoul, Busan, Gwangju and Daejeon, Daegu.[32]

2.1.2. 2. 2 Role of the KFTC

The KFTC has highly centralized regulatory and law making powers.[33] The KFTC is committed to four main mandates: promoting competition, strengthening consumers' rights, creating a competitive environment for Small-and-Medium-

---

EC and UK", [2004] 1 European Competition Law Review 25, 2004, p. 25.

[29] It was a department of government as a working body.

[30] The KFTC was established as a division of the Economic Planning Board. It was only a working body without Committee, which means it was not commission until 1987. The KFTC has been a Commission independent from the Economic Planning Board since 1987. Since 1987, the number of staff and budget of the KFTC have been increased substantially.

[31] Competition Law 37

[32] Presidential Decree of Competition Law 52

[33] Lee Bong Hee, "Effective Enforcement of Competition Law", 2003, p. 2.

Sized Subcontractors (SMEs)[34] and restraining concentration of economic power.[35]

The KFTC is concerned with protection of consumer interests as well as encouragement of competition laws.[36] The KFTC operates in the belief that free and fair competition benefits consumers by ensuring lower prices and better products. To enhance consumer' interests, the KFTC handles consumer protection policy and relevant laws. Consumers need to be educated on the values of competition policy and how these will benefit them. The KFTC has an important rule to fulfil in this educational process.[37] Active competition advocacy and regulatory reforms in the public sector are also major concerns for the KFTC.

The KFTC holds a jurisdictional monopoly over competition issues. The KFTC operates the Competition Law independently, free of intervention by other administrative bodies, under the direct mandate of the Prime Minister. Not only has the KFTC been neutral and independent of political influence, but it has also been free from the interventions of administrative bodies because the Competition Law embodies the fundamental rules of corporate activity and economic transactions in a fair and free economic society.[38]

The Commissioners' function is to make fair and objective decisions independently.[39] They cannot intervene in, or influence, the investigation and review activities of the officials in the KFTC. Decisions on infringements of Competition Law are made by the KFTC Commissioners based on a confrontational structure formed by the accused and the official in charge of investigation and review.

The secretariat is directly involved in drafting and promoting competition policies, investigating competition issues, presenting them to the committee, and handling them according to the committee's decision.[40]

---

[34] According to Act on Small and Medium Size Enterprise (2), SMEs are undertakings with less than 200 employees.
[35] Competition Law 1; Decree of Organization of the KFTC 3
[36] See Competition Law(1); Consumer Fundamental Law (21)
37 See 2008 KFTC Annual Report, 2009, p.25-37.
[38] Kim Kil-Tae, "A Study on Enforcement Procedure in Korean Competition Law", 13(2) Journal of Business Administration and Law 175, 2003, pp. 176-177
[39] See section 2.1.2.2 which deals with the KFTC's case procedure.
[40] Competition Law 39

The KFTC has enormous powers to enforce competition rules.[41] Without judicial involvement, the KFTC alone has the power to order structural remedies, to impose a surcharge as an administrative action and to file a criminal complaint. There is no other quasi- judicial government body such as the KFTC.[42]

As I have already discussed in chapter 1, the objective of competition enforcement is to achieve optimal enforcement of the competition rules through an effective and efficient combination of private and public enforcement.[43] Given that public enforcement has played the dominant role and that private enforcement is only complementary to public enforcement, it is worth considering how the KFTC handles the cases and how many legal actions the KFTC brings before the courts.

2.1.2.2 KFTC's Case Procedure

KFTC's case proceedings involve two stages: examination and deliberation.

Stage 1: Examination

When a probable infringement of the law is reported, the KFTC launches an examination into the conduct concerned.[44] The examination process includes the investigation of relevant documents, taking statements from relevant parties, consultation with experts, and legal reviews. The parties concerned are given opportunities to give their opinions. Confidential business information acquired during examination is strictly protected. If the examiner decides legal measures are required, he (or she) makes an examination report and presents it to the committee. The report is also sent to the examinee who is given an opportunity to submit any objections or comments on the report. [45]

Stage 2 : Deliberation

---

[41] KFTC, "2008 Korea Fair Trade Commission Annual Report", 2008, p. 5.
[42] Government Organization Law 3.
[43] See section 1.2.2.1 which deals with the objective of competition law in Korea.
[44] Competition Law 49
[45] Competition Decree 58

After the examiner presents the report to the committee, [46] the Commissioners review the report and any opinions put forth by the examinee. The report is composed in following order; the examiner's statement, examinee's statement, investigation into evidence, examiner's final opinion, and examiner's final statement. The deliberation process involves a thorough review of the investigation's findings in this order. The examinee is notified of the date, hour and venue of the legal proceedings. The examinee may express his (or her) opinion directly or indirectly through a lawyer during this process.[47] Through this procedure, the committee makes a final decision as to whether any laws have been infringed. If an infringement is duly recognized, the KFTC will impose corrective measures or impose a surcharge[48] with corrective order, make a cease and desist order or prosecute some cases such as cartel to the prosecutory authorities.[49] The committee decision takes the form of a written resolution and it is sent to relevant parties.

2.1.2.3 KFTC's statistics of case handling from 1998 to 2007

In 2007, the KFTC handled a total of 2,979 cases concerned with infringements of laws under the jurisdiction of the KFTC. This was approximately a 281 % increase from 1,061 cases in 1998. [50]

Of these, competition law cases numbered 715, approximately a 177% increase from 407 cases in 1998, and a total of 424 billion Won was imposed in surcharge, a 311% increase from 136 billion Won of 1998. The increase is attributable to the KFTC's increasingly vigorous action against anticompetitive conduct, especially cartels, as is clearly demonstrated by the record amount of surcharge against cartels in the telecommunication sector.

---

[46] This is a committee composed of the nine Commissioners.
[47] Competition Law 52
[48] It is a fine as monetary penalty. However, this fine could be imposed with the only corrective order in competition area. So it is called as a surcharge in Korea.
[49] Competition Law 55(6)
[50] "KFTC's Case handling 2008", KFTC's Statistics Report 2009, p. 30.

Findings by Type of Measure

		1994	1996	1998	2000	2002	2004	2005	2006	2007
Corrective Order		207	250	538	441	497	478	754	644	924
Recommendation for Correction		110	179	57	35	110	100	163	178	124
Warning		307	454	466	399	1,965	2,350	2,389	2,478	1,931
Total		624	883	1,061	875	2,572	2,928	3,306	3,300	2,979
Sur-charge	**No. of Cases**	68	22	69	49	91	91	274	157	327
	Million Won	2,575	16,275	136,217	225,635	87,931	35,883	259,059	175,265	424,220

2.1.2.4 Appeals to the Court

Potential plaintiffs may bring actions before court to appeal the decision of the KFTC when they are not satisfied with the KFTC's decisions. Looking at the statistics from 2001 to 2007, we see that the number of appeals has increased overall. In particular, in 2007, just 57 actions were filed. This was an increase from the actions per year 45 on average in the past. Among the 57 appeals handled in 2007, the KFTC won 34cases (59.6%) and partially won 12(21.1%), while 11 cases (19.3%) lost. Thanks to expertise of the courts, respondents have had more opportunities than before during the actions. The table below shows the annual number for appeal in courts from 2000 to 2007.[51]

[51] "The Number of appeal by the respondents in 2007", KFTC's Statistics Report, 2008.

<Table 4> Court rulings for the recent 7 years (based on final and conclusive rulings)

(Unit: No. of case, %)

Year	Win	Partial win/loss	Loss	Subtotal
2001	27(71.0)	4(10.5)	7(18.5)	38(100)
2002	28(68.3)	8(19.5)	5(12.2)	41(100)
2003	31(66.0)	5(10.6)	11(23.4)	47(100)
2004	35(74.4)	6(12.8)	6(12.8)	47(100)
2005	26(57.8)	11(24.4)	8(17.8)	45(100)
2006	50 (60.2)	14(16.9)	19(22.9)	83(100)
2007	34(59.6)	12(21.1)	11(19.3)	57(100)
Total	231(64.5)	60(16.8)	67(18.7)	358(100)

2.1.2 Private Competition Enforcement System in Korea

To understand private competition enforcement system in Korea, it is necessary to explain organization and role of courts in Korea because to be compensated for damages, private parties should bring damages actions before courts. There are six types of courts in Korea. They are the Supreme Court, the High Courts, the District Courts, the Patent Court, the Family Court, and the Administrative Court. The District Courts, the High Courts and the Supreme Court form the basic three-tier system. Other courts exercise specialized functions with the Patent Court positioned on the same level with the High Courts and the Family Court and the Administrative Court positioned on the same level with the District Courts.[52] The District Court and Family Court may establish Branch Court(s) and/or Municipal Court(s) and Registration Office(s) if additional support is necessary to carry out their task. The Branch Court(s) of both the District Court and the Family Court may be established within the same court.[53]

---

[52] Court Organization Law 3.
[53] Court Organization Law 3.

District courts have jurisdiction in civil disputes, actions for damages since 2004 when the provision of damages actions of Competition Law was revised.[54] However, only the High Court has jurisdiction over the decisions of the KFTC because the KFTC's decisions take effect as judgments of the District Court. Only the High Court can nullify the decision of the KFTC. It has expertise in competition law and resources such as experienced judges.

As the court of last resort, the Supreme Court hears appeals from judgments or rulings rendered by the High Courts, the Patent Court, and the appellate panels of the District Courts or the Family Court in civil, criminal, administrative, patent and domestic relations cases. The Supreme Court has the power to make a definitive review on the constitutionality or legality of orders, rules, regulations, and actions taken by administrative entities.[55]

2.2 Overview of Private Competition Enforcement in the EU

2.2.1 Introduction of Private Competition Enforcement in the EU

Private enforcement in the EU is a matter of looking at the Member States. The remedy for the individual is governed by national law and not EC law. So EC law itself provides no direct solutions as far as civil law consequences of competition infringements are concerned. In respect to damages actions the application of Articles 81 and 82 by the national courts[56] is necessary. The initiative of the Commission to promote private enforcement of EC competition rules, thus, has major implications as regards the approximation of Member States' tort laws and civil procedure regulations.[57]

Competition law in the EU has mainly been applied by the public competition authorities such as European Commission and the NCAs.[58] From the

---

[54] Before the revision of this provision, plaintiff can bring damages action before court with the only decision of infringement of competition law of the KFTC.
[55] Court Organization Law 14.
[56] Regulation 1/2003 Article 6. It expressly gives power to national courts to apply Articles 81 and 82.
[57] Francisco Marcos and Albert Sánchez Graells, "Damages for breach of the EC antitrust rules: harmonising Tort Law through the back door?", InDret, 2008, p.5, available www. Indirect.com
[58] Lowri Evans, "Private enforcement and public enforcement – a European perspective", The 5th Seoul

adoption in 1962 of the first procedural regulation implementing the competition rules, Regulation 17,[59] until its replacement by the Modernisation Regulation, Regulation 1/2003[60] on 1 May 2004, the Commission played the leading role in the application of the competition rules and the development of competition policy.[61] The Commission continues in its leading role even after the decentralization brought about by Regulation 1/2003.

Private enforcement of the competition rules has hitherto been underdeveloped in the EU.[62] During the past forty plus years the role of national courts in EC competition enforcement has not been particularly strong[63] hence it can be assumed that a significant number of victims of anticompetitive activity are not being compensated for their losses.[64] The 2004 Ashurst study commissioned by the Commission[65] revealed a "total underdevelopment" with regard to private enforcement and an "astonishing diversity" in the approach taken by the Member States.[66] It also stated that of all competition law enforcement procedures within

---

International Competition Forum, 2008 p.37; With regard to the 2005 and 2006 activities of the European Commission, See generally, John Kallaugher, Andreas Weitbrecht, "Developments Under Articles 81 and 82 EC-The Year 2005 in Review, ECLR, 2006, p. 137-147; See generally, John Kallaugher, Andreas Weitbrecht, "Articles 81 and 82 EC in 2006-The Year in Review", ECLR, 2007; Assimakis P. Komminos, "Public and Private Antitrust Enforcement in Europe: Complement? Overlap?", 3(1) Competition Law Review 5, 2006, p. 6; Barry Rodger, "Competition Law Litigation in the UK Courts: A Study of All Cases to 2004", ECLR, 2006, p. 241; Dan Wilsher, "The public Aspects of Private Enforcement in EC law: Some Constitutional and Administrative Challenges of a Damages Culture", The Competition Law Review, 2006, p. 39-40; Patricia Hanh Rosochowicz, "Deterrence and the relationship between public and private enforcement of competition law", Amsterdam Centre for Law and Economics Workshop, 2005, p.5; Lowri Evans, "Private enforcement and public enforcement – a European perspective", The 5th Seoul International Competition Forum, 2008, p.37; With regard to the 2005 and 2006 activities of the European Commission, See generally, "John Kallaugher, Andreas Weitbrecht, "Developments Under Articles 81 and 82 EC-The Year 2005 in Review, ECLR, 2006, p. 137-147: John Kallaugher, Andreas Weitbrecht, "Articles 81 and 82 EC in 2006-The Year in Review", ECLR, 2007

[59] Council Regulation No. 17 on implementing Articles 85 and 86 of the Treaty of 21 February 1962,

[60] Council Regulation 1/2003 on the implementation of the rules on competition laid down in Arts 81 and 82 of the Treaty, [2002] O.J. L1/1.

[61] Sue Ann Mota, 'Hide it or Unbundle: A Comparison of the Antitrust Investigations against Microsoft in the U.S. and the E.U.", Pierce Law Review, 2005, p. 194.

[62] Arundel McDougall and Alexandra Verzariu, "Vitamins Litigation: Unavailability of Exemplary Damages, Restitutionary Damages and Account of Profits in Private Competition Law Claims", E.C.L.R.,29(3), 2008, p.184.

[63] Wils, "Should Private Antitrust Enforcement Be Encouraged in Europe?", 26(3) World Competition 473, 2003, p.475; Eric McCarthy, Allyson Maltas, Matteo Bay and Javier Ruiz-Calzado, "Litigation culture and versus enforcement culture : A comparison of US and EU plaintiff recovery actions in antitrust cases", Antitrust Review of the Americas, 2007, p.39.

[64] Katarina Pijetlovic, "Reform of EC Antitrust Enforcement: Criticism of New System is Highly Exaggerated", ECLR, 2004, p. 357.

[65] Reference should be to whole report, not just to Executive Summary.

[66] See the Ashurst Report, "Study on the Conditions of Claims for Damages in Case of Infringement of EC Competition Rules-Comparative Report", 2004. This study was undertaken by the law firm Ashurst

the EU, approximately only 1-2 % is commenced by private parties. There had only been 60 adjudicated damages cases since the creation of the Community, and in only 23 cases were damages awarded.[67]

Despite some recent signs of improvement, successful damages actions are still rare, and the majority of Member States have had no real experience of private antitrust damages actions to date.[68] Many factors may have contributed to the lack of private enforcement in the competition area. One of main factors for the lack of private enforcement is the significant differences between the procedural and substantive rules in the Member States governing actions for damages. So barriers caused by different legal frameworks in different Member States have been blamed for the scarcity of private litigation.[69] Traditional rules of civil liability and procedure are also one of main factors for limited damages actions in competition area, due to the complex factual and economic analysis often required and the unfavourable risk/reward balance for plaintiffs.[70]

However, on the other hand it has also been argued that the lack of private competition litigation in the EU cannot be blamed on the content of the substantive rules[71] and that there are other important reasons for lack of private enforcement. Firstly, these are partly cultural, related to a generally low level of litigiousness. EU citizens generally do not seem to be excessively concerned about the absence of private enforcement.[72] This may be because losses from competition infringement are often small and widely dispersed and thus do not pose a serious threat for the individual.[73] Secondly, the unavailability of class actions, contingency fee, treble

---

2004 by order of the EC Commission, available on the internet: others/private_enforcement/comparative _report_clean_en.pdf, 2004, at 1; Clifford A. Jones, "Private enforcement of Antitrust Law in the EU, UK and USA", Oxford 1999, p. 85.

[67] Ashurst Report, supra note 66, p.1; Christian Miege, "Modernization and Enforcement Pluralism-The Role of Private Enforcement of Competition Law in the EU and the German Attempts in the 7th Amendment of the GWB", Amsterdam Centre for Law and Economics Workshop: 'Remedies and Sanctions in Competition Policy', 2005, p.5.

[68] European Commission, "Commission Staff Working Document accompanying document to the White Paper on Damages actions for breach of the EC antitrust rules", SEC (2008) 405, section 2.1.

[69] Jones, supra note 66, p.16.

[70] European Commission, supra note 68, at sections 2.2 - 2.3.

[71] Magnus Gustafsson, "What are the Prospects for Enhanced Private Antitrust Litigation? A Swedish Perspective", 30(4) European Law Review, 2005, pp.491-492.

[72] See Ashurst Report, supra note 66.

[73] Wils, supra note 63, p.487.

damages or discovery procedures such as those of the US have been suggested as other reasons for weak private enforcement.[74]

However, the importance of private competition enforcement has been recognized in the EU.[75] Realizing the potential benefits of private enforcement, the Commission has been actively seeking ways of establishing a Communitywide private enforcement regime by invigorating actions for damages before the national courts against the infringements of competition law.[76]

Furthermore, there is now a legal basis under Community law for damage actions in the case of *Courage v Crehan.*[77] After some 40 years of application of Article 81 of the EC Treaty, the Court of Justice, in *Crehan*, finally dealt with competition damages as a possible remedy for infringements of Article 81. In *Courage* the ECJ held that national courts must provide a remedy in damages for the enforcement of the rights and obligations created by Article 81.[78] The judgment in *Courage v Crehan* was the seminal case in establishing a Community right to damages.

In *Courage* the Court emphasised that actions for damages before the national courts can make a significant contribution to the maintenance of effective competition in EU and that the right to claim damages strengthens the working of the EC competition rules and discourages agreements and practices which are liable

---

[74] Walter Van Gerven, "Substantive Remedies for the Private Enforcement of EC Antitrust Rules Before National Courts," EUI-RSCAS/EU Competition Law and Policy Workshop, 2001, p. 21.

[75] Greg Olsen, "Actions for damages are Compensation and deterrence? The passing on defence and the future direction of UK private proceedings", CLI 4.8(3), 2005, p.1.; Ulf Boge, Konrad Ost, "Up and Running, or Is It? Private Enforcement –The Situation in Germany and Policy Perspectives", European Competition Law Review 27(4), 2006, p.205; Magnus Gustafsson and Foad Hoseinian, " Private Enforcement of EC Competition Law: Swedish Supreme Court Judgement on the Validity of Follow on Contracts", 27(1) European Competition Law Review 5, 2006, p.5; Gregory P. Olsen, "Enhancing Private Antitrust Litigation in the EU", 20 Antitrust 73, Fall 2005, p.73; Jürgen Basedow, "Private Enforcement of EC Competition Law", Kluwer Law, 2007, p. 3; David J. Gerber, "The Transformation of European Community Competition Law?", Harvard International Law Journal, 1994, p.103-104..

[76] European Commission, "Green Paper - Damages Actions for Breach of the EC Antitrust Rules", COM (2005) 672 final; European Commission, "White Paper on Damages actions for breach of the EC antitrust rules", Com (2008) 165 final..

[77] *Courage v Crehan*, C-452/99, [2001]ECR I-6297

[78] *Courage v Crehan*, C-452/99, [2001] ECR I-6297. It is accepted that the Court's ruling here applies to Article 82 cases as well.

to restrict competition.[79]

It should be noted that the Commission Staff Working Paper accompanying the Green Paper acknowledges that "the obligation for national courts to provide a remedy in damages was established by the [ECJ] in its ruling *Courage v Crehan*"[80], and says that:

"[T]he *Courage* judgment is based on a long established jurisprudence of the Community Courts relating to the effective protection of Community rights by the courts of the Member States"[81]

The ECJ reaffirmed the *Courage* principle in *Manfredi*,[82] again saying that any individual can rely on a breach of Article 81 before a national court. In *Manfredi* it said that the Member State must provide for injured person to pursue the infringer for loss of profit as well as actual loss. However, in both *Crehan* and *Manfredi* the ECJ stressed that in the absence of Community rules it is for the domestic legal systems of the Member States to lay down rules governing actions for safeguarding the rights that individuals derive from Community law, subject to the principles of equivalence and effectiveness.[83] In *Crehan* the Court *did* lay down a Community rule, namely that a Member State cannot have an absolute bar on recovery by a co-contractor. However, in *Manfredi* the Court failed to take the opportunity to provide further harmonization as it left matters of limitation periods and the types of damages awarded to the law of the Member States.[84] In *Manfredi*, therefore, the ECJ declined to harmonize through case law. The only other method of harmonizing Member States' laws on damages actions is by Community legislation or soft law, and it is this route that the Commission is currently pursuing.[85]

---

[79] *Courage v Crehan*, C-452/99, [2001]ECR I-6297, at para 27; C-295/04, *Manfredi v. Lloyd Adriatico Assicurazioni SpA*, C-295/04, [2006] ECJ, 348, para. 91.
[80] Commission Staff Working Paper Annex to the Green Paper SEC (2005) 1732, para.18.
[81] Ibid., para 19 ; See also the Ashurst Report, supra note 66.
[82] *Manfredi v. Lloyd Adriatico Assicurazioni SpA*, C-295/04, [2006] ECJ, 348, para.?
[83] In respect to principles of equivalence and effectiveness, see section 3.2.3.3 which deals with current situation of compensatory, punitive or exemplary damage in the EU.
[84] See section 3.2.2 which deals with the current situation in respect of the criteria and measurement of Damages in the EU.
[85] See section 2.2.3. which deals with substantial changes necessary to encourage private enforcement in

2.2.2 The Need for Private Competition Enforcement in the EU

The need to encourage private competition enforcement was first expressed officially in the White Paper on the modernization of the enforcement of the EC competition rules the Commission published in 1999.[86] When the Commission launched the White Paper it had as a major objective the maintenance and the improvement of the effectiveness of the enforcement of the EC competition rules in an enlarged EU.[87]

According to the Commission an effective private enforcement is a crucial step to achieving the goals of the 2000 Lisbon agenda by ensuring competition.[88] In the Lisbon Agenda the Member States signed up to a programme of economic reforms designed to make the EU "the world's most competitive and dynamic knowledge-based economy" by 2010.

Former Commissioner Monti explained, "it is our aim that companies and individuals should increasingly feel encouraged to make use of private actions before national courts in order to defend the subjective rights conferred on them by the EC competition rules."[89]

The Commission regards private enforcement, especially damages actions where loss has been suffered as a result of an infringement of EC competition law, as an integral part of competition law enforcement.[90] Private enforcement would, it is claimed, fill a gap[91] by serving as an important means of ensuring competition.

---

the EU.

[86] European Commission, White Paper on the modernisation of the rules implementing Articles 81 and 82 of the EC Treaty, Commission Programme No 99/027.

[87] Philip Lowe, "Current Issues of E.U. Competition Law: The New Competition Enforcement Regime, Northwestern Journal of International Law and Business, 2004, p. 568; Philip Lowe, "Implications of the recent reforms in the antitrust enforcement in Europe for national competition authorities", Italian Competition/Consumers day, 2003, p. 1.

[88] See "Commission of the European Communities", 2004 Report on Competition Policy, 2004, p.3 The EU's system of economic governance and indeed the EC Treaty are based on the principle of an open market economy with free competition.

[89] See Mario Monti, ex-Competition Commissioner, Speech Before the Sixth EU Competition Law and Policy Workshop, June 1-2, 2001, p. 121-123.

[90] John Pheasant, "Private Antitrust Damages in Europe: As the policy debate rages, what are the signs of practical progress?", Business Law International Vol 8, 2007, p.228.

[91] The gap means the cases left uninvestigated through lack of resources. This gap is generated by the

To encourage private enforcement, there has been much talk of the need to stimulate private competition enforcement to supplement public enforcement.[92]

The European Commission also considers that it is necessary to encourage private enforcement in order to protect consumers' interests directly as well as promoting competition. By promoting private enforcement of EC competition rules, the Commission is not only looking at strengthening the enforcement of these rules by increasing the incentives for compliance, but also, as is seen from a speech by the former Commissioner Mario Monti, at improving the protection of consumers from anticompetitive behaviour.[93] He stated that:

"The competition rules are to ensure that consumers benefit from lower prices and better products as a result of effective competition in markets.....Consumers should have more access to remedial action in the form of private enforcement in order to protect their rights and to obtain damages in compensation for losses suffered."[94]

The Commission announced in its White Paper on Compensating Consumer and Business Victims of Breaches of the Competition Rules that:

"[f]acilitating damages claims for breaches of the [EC's] antitrust rules will not only strengthen the enforcement of competition law, but will also make it easier for consumers and firms who have suffered damage from an infringement of competition law to recover their losses from the infringer."[95]

Furthermore, it is necessary to ensure deterrence and compensation through

---

perceived inability of public enforcement to deal with all worthy cases,

[92] Lowri Evans, "Private enforcement and public enforcement – a European perspective", The 5th Seoul International Competition Forum, 2008 p. 37; M. Gustafsson, supra note 71, p. 490.

[93] See speech by former Commissioner Monti, M., "Private litigation as a key complement to public enforcement of competition rules and the first conclusions on the implementation of the new Merger Regulation", [2004] Speech/04/403, IBA – 8th Annual Competition Conference, Fiesole, 17 September 2004, p. 2; Corinne Bergen, "Generating Extra Wind in the Sails of the EU Antitrust Enforcement Boat", Journal of International Business and Law, 2006, p.204.

[94] Mario Monti, "Effective Private Enforcement of EC Antitrust Law", 6th EU Competition Law and Policy Workshop (June 1-2, 2001), Speech/01/258.

[95] Commission Presents White Paper on Compensating Consumer and Business Victims of Breaches of the Competition Rules, 2005 available at http:// ec.europa.eu/comm/competition/antitrust/actions dama ges/index.html.

enlisting consumer and competitor power through the civil justice system.[96] The current Commissioner for competition, Neelie Kroes has argued that increased private action would further promote a culture of competition among businesses, industry, and consumers.[97] She has identified a greater public awareness of competition rules as a key element in creating a "culture of competition" in the EU.[98]

2.2.3 Substantial Changes to Encourage Private Enforcement in the EU

The Commission has made clear that it is keen to increase private enforcement of the full range of competition infringements under EC law and not just additional enforcement in cases already dealt with by the public authorities.[99]

On December 16, 2002, the Council adopted Regulation 1/2003, which replaced the old Regulation 17/62.[100] It established a new EC competition enforcement regime based on the joint enforcement of the EC competition rules by the Commission and national authorities. One of the main drivers of the modernization process was the need to rationalize the use of the Commission's resources.[101] To facilitate the functioning of a decentralised system[102] and to

---

[96] Neelie Kroes, "Reinforcing the fight against cartels and developing private antitrust damage actions: two tools for a more competitive Europe", Commission/IBA Joint Conference on EC Competition Policy, Speech/07/128, Brussels, 2007, available at http://europa.eu; "Facilitating compensation for breach of competition rules: the White Paper", Freshfields Bruckhaus Deringer, 2008, p.1; Neelie Kroes, "Damages Actions for Breaches of EU Competition Rules: Realities and Potentials", Opening speech at the conference 'La reparation du prejudice cause par une pratique anti-concurentielle en France, Speech/05/613, Paris, 2005; Ulf Boge, Konrad Ost, "Up and Running, or Is It? Private Enforcement –The Situation in Germany and Policy Perspectives", ECLR, 2006, p.205; M. Gustafsson and F. Hoseinian, supra note 75, pp.5-6; Corinne Bergen, supra note 93, p.204.

[97] Neelie Kroes, "Enhancing Actions for Damages for Breach of Competition Rules in Europe", Dinner Speech at the Harvard Club, New York, Speech/05/533, Sept. 22, 2005, available at http:// europa.eu.int/rapid/press releases action.

[98] Neelie Kroes's speech/05/613, supra note 96, p. 3; John Pheasant, "Private Antitrust Damages in Europe: The Policy Debate and Judicial Developments", Antitrust, 2006, p. 64-64.

[99] Commission MEMO/05/489, accompanying the Green Paper on damages actions, entitled "What in the Commission's view are the advantages of private actions for damages?", n 32.

[100] 7 Council Regulation No. 17 on implementing Articles 85 and 86 of the Treaty of 21 February 1962, [1957-62] OJ Special Edition 8.

[101] Antitrust, "Making Waves: Interview with EU Commissioner for Competition Neelie Kores", 22-SPG Antitrust 47, 2008, p.48.

[102] Cornelis Canenbley, "Co-operation Between Antitrust Authorities in – and Outside the EU: What Does it Mean for Multinational Corporations: Part 1, ECLR, 2005, p.106-110.

ensure the homogeneity of its application throughout an enlarged EU, the Commission decided to complement Regulation 1/2003 with a package of six accompanying notices and a Commission implementing regulation,[103] the so-called *Modernization Package* in 2004. [104] The *Modernization Package* governs the application of Articles 81 and 82 EC.[105]

Regulation 1/2003 made many changes. However, here I am concentrating on the change to encourage private enforcement by giving more power to Member States' courts to enforce the law.[106] To encourage private enforcement, Regulation 1/2003 abolished the Commission monopoly over the application of the exemption provision contained in Article 81(3).[107] Article 81(3) EC became a directly applicable provision without the need for a prior administrative decision. Rendering Article 81(3) directly applicable provision means that the enforcement of Article 81 in its entirety is no longer the de facto sole responsibility of the Commission. The reform enabled the decentralization of the enforcement of Community competition rules as Art. 81 as well as 82 EC can be now applied by national courts and NCAs throughout the EU in their entirety. Decentralised application, especially of Article 81 (3) can bring the rules closer to the undertakings and the citizens since Member States have an obligation to apply the EC competition rules, at least alongside national law.[108] The direct applicability of Article 81(3) of the EC Treaty implies more potential for the application of the EC competition rules by Member States' courts and competition authorities.[109]

---

[103] See, for example, Commission Notice on the cooperation between the commission and the courts of the EU member states in the application of Articles 81 and 82, OJ C 101/54, April 27 2004; Guidelines on the effect on trade concept contained in Articles 81 and 82 of the EC Treaty, OJ C 101/81, April 27 2004; and Guidelines on the application of Article 81(3) of the EC Treaty, OJ C 101/97, April 27 2004.

[104] The Modernization Package was finalised with the adoption of the new merger control regulation 139/2004 on 20 March 2004. See Press Release IP/04/441 of 30 March 2004. See for a very comprehensive description of all these measures, Sven B. Völcker, "Developments in EC Competition Law in 2003: An Overview", 41 CML Rev. 1027, 2004, p.1028.

[105] Article 81 prohibits anti-competitive agreements or collusion and Article 82 prohibits the abuse of dominance. The actual numbering of the EC Treaty will be used throughout this thesis

[106] Philip Haberman, "Quantifying antitrust damages: Flexibility rather than prescription is the best approach", CLI 5 5 (9), 2006, p.2.

[107] Previously, only the commission could exempt restrictive agreements under Article 81(3). The commission's proposal for the regulation (COM (2000) 582) described one of the aims of the regulation as "promoting private enforcement through national courts"

[108] Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, [2003] OJ L1/1

[109] Damien Geradin, "Competition between Rules and Rules of Competition: A Legal and Economic Analysis of the Proposed Modernization of the European of EC Competition Law, Columbia Journal of

The adoption of Regulation 1/2003 was an important step toward increasing the involvement of national courts in competition enforcement, and the then Commissioner described it as constituting "a revolution in the way competition rules are enforced in the European Union".[110] It thus leads to a certain 'privatisation' of competition policy enforcement, since the burdens and risks caused by infringement of competition rules now fall entirely on companies and their legal advisers.[111] The decentralization extends the possible enforcers of EC competition law and allows the Commission to concentrate on the most serious infringements of Articles 81 and 82 EC by re-focusing its resources.[112]

However, the Commission has made it clear that it does not consider the devolution of responsibility for the enforcement of EC competition law to the NCAs as a sufficient means of achieving decentralization.[113] To encourage private enforcement, it is important to ensure effective damages actions.[114] To ensure effective damages actions, the Commission published a Green Paper in 2005 on ways in which this be achieved.[115] The purpose of the Green paper was to identify the main obstacles and to establish an adequate legal framework which facilitates damages actions before national courts.[116] It focused on aspects primarily of a procedural and practical nature, which are at the core of the effectiveness of private enforcement.

European Law, 2002, p.1.

[110] Interview with Mario Monti, published in EC Competition Policy Newsletter, 2004, available at: http://europa, eu.int/comm./competition/publications/special/interview_monti.pdf.

[111] Marsden, "Inducing Member State Enforcement of European Competition Law: A Competition Policy Approach to 'Antitrust Federalism' ", 18 ECLR, 2009, p.235.

[112] Assimakis P Komninos, "EC Private Antitrust Enforcement: Decentralised Application of EC Competition Law by National Courts", Hart Publishing, 2008, p.40.

[113] European Commission, "Commission Staff Working Paper accompanying the White Paper on Damages actions for breach of the EC antitrust rules", Com (2008) 165 final, 2008, p.8-11.

[114] Hannah L. Buxbaum, "Private Enforcement of Competition Law in the Untied States- of Optimal Deterrence and Social Costs", in 「Private Enforcement of EC Competition Law」 (ed. by Jürgen Basedow),Kluwer Law, 2007, p.41; Christian Diemer, "The Green Paper on Damages Actions for Breach of the EC Antitrust Rules", ECLR, 2006, p.312-313; Sven Norberg, "Some Elements to Enhance Damages Actions for Breach of the Competition Rules in Articles 81 and 82 EC", 32nd Annual International Antitrust Law & Policy Conference, Fordham, New York, 2005 p. 4; Paul Hughes, "The Enforcement of Private Actions for Breaches of EC Competition Law-The Role of the Shareholder under English Law", Competition Law Review, 2006, p.80-81.

[115] European Commission Green Paper on damages actions for breach of the EC competition rules, COM(2005) 672 final of 19 December 2005.

[116] John Pheasant, supra note 90, p.227-228.

Following the Green Paper and the subsequent consultation, the Commission made specific proposals in the White Paper on EC competition damages actions in 2008.[117] The primary objective of this White Paper is to improve the legal conditions for victims to exercise their right under the Treaty to reparation of all damage suffered as a result of a breach of the EC competition rules.[118] The Commission clarifies in the White Paper that the main objective of damages claims is to fully compensate the victims of an anticompetitive conduct.[119] To ensure full compensation, there is a definite shift in the White Paper towards recognising the value of compensating victims for the victims' own sake, not just for 'deterrence'. In the White Paper, and the accompanying Staff Working Paper[120] the Commission abandons deterrence as a primary objective of private enforcement.

To ensure the right to compensation for all damage suffered as a result of a breach of the EC competition, the White Paper covers the wide range of problems that victims face when bringing an antitrust damages action. These include, for example, difficulties in relation to access to evidence, standing in court, great legal uncertainty regarding the admissibility and scope of the passing-on defence, and the lack of collective redress in most EU Member States. To solve these problems, the White Paper proposes policy changes and effective redress mechanism for victims to be fully compensated for the harm they have suffered.[121] These specific measures balance rights and obligations of both the plaintiff and the defendant and include safeguards against abuses of litigation.[122] The White Paper can therefore be seen as the latest stage of a policy initiative which was already laid down in Regulation 1/2003, in that Recital 7 to the Regulation stressed the essential role of national courts in the application of the EC competition rules, for example by

---

[117] White Paper on Damages actions, supra note 76; Commission Staff Working Paper accompanying the White Paper, supra note 113.
[118] White Paper on Damages actions, supra note 76, at 1.2(Objectives, guiding principles and scope of the White Paper)
[119] Tim Reher, "The Commission's White Paper on Damages Actions for Breach of the EC Antitrust Rules", The European Antitrust Review, 2009, p.1.
[120] Commission Staff Working Paper accompanying the White Paper, supra note 113, at paras 12-15.
[121] See section 1.2.2.2 which deals with the objectives of EC competition law.
[122] European Commission, "Commission Staff Working Paper accompanying the White Paper on Damages actions for breach of the EC antitrust rules", SEC (2008) 404, at paras.10-12.

awarding damages to the victims of infringements.[123] The White Paper is an also important step politically, as can be seen from the European Parliament resolution of welcoming the White Paper as a way of furthering the protection of consumers.[124]

However, it must be noted that the Commission has stressed that it wants to foster meritorious compensation, not excessive litigation, and to ensure that private actions can be effectively facilitated without incentivising unmeritorious litigation.[125] As Commissioner Kroes puts it, the Commission wants to "foster a competition culture, not a litigation culture."[126] There is a fear that the introduction of elements of the US legal system could result in 'an expansion of the US litigation culture'.[127] The Commission has apparently accepted that how to facilitate private enforcement means finding a balanced approach that mitigates the unwanted social costs of encouraging private competition law litigation.[128]

2.2.4 Harmonization of different National laws

There are gross differences in civil procedure laws among the Member States because the rules of substance are in the domain of national law. That means potentially 27 different national laws.[129] Existing differences between legal systems, it has been pointed out, do not help the process of establishing private enforcement as a credible alternative to public enforcement.[130]

---

[123] Council Regulation 1/2003, OJ L 1, Recital 7; See also, Rainer Becker, Nicolas Bessot and Eddy De Smijter, " The White Paper on damages actions for breach of the EC antitrust rules", Competition Policy Newsletter, ISSN 1025-2266, 2008.

[124] European Parliament Resolution, at 26 march 2006 available at http://www.europarl.europa.eu/ sides/ get.Doc.

[125] White Paper on Damages actions, supra note 76, p.3; Commission Staff Working Paper accompanying the White Paper, supra note 113, pp.10-12; Antitrust, supra note 101, p.53.

[126] Neelie Kroes's speech/05/533, supra note 97, p.3.

[127] Mark Wegener and Peter Fitzpatrick, "Europe Gets Litigious: Class actions and competition enforcement may change Europe's legal culture", Legal Times, 2005.

[128] European Commission, "Commission Staff Working Paper accompanying the Green Paper on Damages actions for breach of the EC antitrust rules", 2005, p.12.

[129] Clifford A. Jones, "After the Green Paper: The Third Devolution in European Competition Law and Private Enforcement", 3(1) Competition Law Review2, 2006, p.2.

[130] Antonio Capobianco,Wilmer Cutler, Pickering Hale and Dorr LLP, "Private Antitrust Enforcement of EC Competition Rules: Recent Developments", CLI 25(3), 2004, p. 4.

The current system is likely to lead to instances of actions against defendants in multiple jurisdictions based on the same claims, which may involve not only duplication and inefficiency but also threaten the uniform application of EC competition law. These different procedural rules could tend to create unequal competition conditions in the internal market[131] and lead to forum shopping.[132] In the absence of some system of coordination, or mutual recognition of decisions by national courts from differing Member States, it is claimed that the scope for the inconsistent application of EC competition law is significant.[133] In order to prevent inconsistent judgments regarding the same infringement and multiple recoveries which seriously disturbed the dynamics of US private enforcement regime, commentators and practitioners have urged that the Community rules of conflicts of laws should be reconsidered.[134]

Furthermore, the issue of harmonization is closely connected to national procedural standards. In the absence of a significant harmonization effort at EU level, national courts will continue to play only a limited role in the enforcement of EC competition rules since they create confusion and uncertainty on the rights granted to private parties and creates opportunities for forum shopping. These uncertainties can be eliminated by harmonization measures taken at European level.[135] To eliminate these uncertainties, it is submitted that the plaintiffs in anticompetitive actions must have equal access to justice throughout the 27 Member States. Important issues must be addressed in a homogenous way in order to maintain a level playing field. The interaction of measures facilitating damages actions with various aspects of public enforcement needs to be addressed because individual actions by Member States are not sufficiently capable of achieving consistent implementation of competition law.

For the sake of ensuring efficient and uniform application of competition

---

[131] See generally, Assimakis P. Komninos, "New prospects for private enforcement of EC competition law", 39 C.M.L.Rev. 447, 2002, p.465.
[132] Charles E. Koob, David E. Vann, Arman Y. Oruc, "Developments in Private Enforcement of Competition Laws- Introduction", Simpson Thacher & Bartlett LLP, 2004, p. 3.
[133] G. Olsen, "Enhancing Private Antitrust Litigation in the EU", 20 Antitrust 73, 2005, p. 76.
[134] John Pheasant, "Damages Actions for Breach of the EC Antitrust rules: The European Commission's Green Paper", 27 ECLR 365, 2006, p. 376-377.
[135] Antonio Capobianco, supra note 130, p. 4.

rules within the 27 Member States, the Community legislature must –with a view to harmonizing the conditions for private liability to arise- take measures that must be sufficiently precise to satisfy the principle of legal certainty and the requirement of uniform application of Community law in the Member States. The possible solutions discussed to date range from a full or alternatively partial harmonisation of national procedural rules at the EU level right through to an approach to private competition enforcement at Member State level only.[136]

The combination of the national procedures for damages actions coupled with the more developed substantive laws of the Commission will create a more flexible environment for private actions in numerous jurisdiction. These should be in the form of general principles, perhaps implemented as directives to be adopted in the most suitable fashion for each member state. According to Commission Staff Working Paper accompanying the White Paper, depending on the degree to the level playing field in the EU, to ensure the effectiveness of competition damages actions, a choice will have to be made to between the available instruments for Community legislative action.[137] These could include not only soft law such as the guidelines but also a regulation and/or a directive based on Article 83 EC that would contribute to the harmonization of the procedural and substantive laws of the member states.

It is worth considering that in order to increase the effectiveness of the exercise of the right to competition damages and to create a basic framework for an effective competition damages regime in all Member States, the Commission considers Community legislation –as opposed to soft-law approaches such as guidelines or recommendations – to be the most appropriate way forward.[138] The issues that may require EC legislative actions are the availability of collective and representative actions, the broad discovery rule the binding effect of NCA decision and so on. [139]

It has been said that if everything in the White Paper comes to pass then there

---

[136] Mario Hilgenfeld, "Private Antitrust Enforcement: Towards a Harmonised European Model or a "Patchwork" of Various Member States' Rules", Int. T.L.R. 14(2), 2008, p.39.
[137] Commission Staff Working Paper accompanying the White Paper, supra note 113, p.96-98.
[138] Commission Staff Working Paper accompanying the White Paper, supra note 113, at para. 319 ; Tim Reher, supra note 119, p. 4.
[139] Commission Staff Working Paper accompanying the White Paper, supra note 113, at para 322.

will surely be a change in the frequency and significance of claims based on competition grounds. However, details are still lacking to determine whether the system is likely to result in a preponderance of good or bad claims being brought.[140]

2.3 Overview of Private Enforcement in the UK

2.3.1 Development of Competition Law in the UK

Competition law in the UK has undergone a number of radical changes to facilitate private competition enforcement since 1998. Before the implementation of the Competition Act 1998, UK competition law was based on a system of registration of agreements which contained certain types of clauses.[141] A general competition law regime was set out in the Competition Act 1998 (CA98), which came into effect on March 1, 2000, replacing the old Restrictive Trade Practices legislation[142] with provisions based on Arts 81 and 82 of the EC Treaty (save that an effect on trade between Member States need not be shown).

In the UK, there are two systems of competition law: domestic law and the law of the European Community. The relationship has been clarified by Regulation 1/2003, Article 3. The passage of the Competition Act 1998 strengthened the domestic regime and more closely aligned it with EC law.[143] The Competition Act 1998 carried out this alignment by section 60[144] which requires the UK competition authorities and the courts to have to regard to the way in which the Community Courts have interpreted and applied Articles 81 and 82 of the EC Treaty.[145] Section 60(1) and (2) imposes a duty to achieve consistency of decisions of the Commission. S 60(3) says the courts 'must have regard to' decisions of the Commission. The Competition Act 1998 introduced two new competition prohibitions which mirror Articles 81 and 82 of the EC Treaty.[146] In the UK, infringement of Articles 81 and

---

[140] Luke R. Tolaini and Anna M. Morfey, "Antitrust Damages Actions in Europe: A Step in the U.S. Direction?", 22-SUM Antitrust 93, 2008, p.97.
[141] The system is described in R.Whish, "Competition Law" (3rd ed.), Butterworths, 1993, Ch.5.
[142] 'Restrictive Trade Practices Act 1976' (previously the 'Restrictive Trade Practices Act 1956')
[143] Mark Furse, "Competition Law of the EC and UK"(6th ed.), Oxford, 2007, p.2.
[144] Competition Act 1998, s.60.
[145] See R.Whish, "Competition Law"(6th ed.), Oxford, 2009, pp. 362-367.
[146] Most Member States of the European Community have competition laws which reflect EC law, though none has an equivalent to Competition Act 1998, s.60.

82 of the EC Treaty is a tort for which the principle remedy is the award of damages.[147] The two competition prohibitions are a prohibition against anti-competitive behaviour (the chapter I prohibition) and a prohibition against an abuse of a dominant position (the chapter II prohibition) [148] which are enforced by the Office of Fair Trading (hereafter, OFT) and sectoral regulators.[149] However, although the Government introduced the Competition Act 1998 with the clear intention that it should allow private rights of action, the original Competition Act 1998 was silent on the question whether injured parties have a right to bring action against those who infringe either of the prohibitions.[150]

In order to encourage private actions, the UK Government published further proposals for strengthening UK competition law in a consultation paper entitled "A World Class Competition Regime" published in July 2001. In the paper the Government stated:

"Private actions are ... a very important limb of an effective competition regime. Where behaviour is illegal under competition laws, parties who are harmed ought to be able to bring action against the perpetrators."[151]

Following that consultation, radical changes were made, particularly in relation to the redress available to harmed parties.

---

[147] *Courage Limited v Bernard Crehan*, C-453/99, [2002]Q.B.507; *Courage v Crehan*, C-452/99, [2001]ECR I-6297.

[148] These prohibitions mirror articles 81 and 82 of the EC Treaty. As a result of the modernisation of EC competition law, where conduct investigated may have an effect on interstate trade within the EU, the enforcing authority is obliged to apply articles 81 and 82 (Regulation 1/2003, art.3). As a result, these provisions are generally applied in parallel with the equivalent domestic prohibitions. See generally, N.Green and A.Robertson (eds), "The Europeanization of UK Competition Law", Hart Publishing, 1999.

[149] In contrast to the position in other European systems, most UK sectoral regulators have the power to enforce general competition law in their sectors, in addition to their sector-specific regulatory powers. These powers are applied concurrently with the OFT, although in practice the regulators are left to apply competition law in the sectors they cover and detailed procedures exist to avoid conflicts. The extent to which sectoral regulators have made use of their general competition law powers were reviewed by the Department of Trade and Industry and HM Treasury; "Concurrent Competition Powers in Sectoral Regulation", May 2006, URN 06/1244.

[150] "A prohibition approach to anti-competitive agreements and abuse of a dominant position: draft bill", DTI, 1997, Ch.7.23; "Barry J. Rodger, "Private Enforcement and the Enterprise Act : An Exemplary System of Awarding Damages, ECLR, 2003, p.103; ; See also Edward Brown, "Legislation: Legislative Reform-EC Modernization Programme", ECLR, 2004, p.133.

[151] A World Class Competition Regime, Cm. 5233, (2001).

First, the Enterprise Act 2002 was passed and the relevant competition provisions came into effect on June 20, 2003. The Enterprise Act 2002 reformed those areas of law which had been largely untouched by the Competition Act 1998. The Enterprise Act 2002[152] provided for private enforcement in what is now section 47A CA 1998. Under Section 47A a person who has suffered loss or damage as a result of a relevant prohibition may make any claim for damages, or any other claim for a sum of money, in proceedings brought before the specialist Competition Appeal Tribunal (hereafter, CAT).[153] The CAT can hear claims for damages following an infringement decision of the OFT or the EC Commission under section 47A. These actions are known as 'follow-on actions'.[154] In these follow on actions, decisions of the OFT or the EC Commission that the UK or EU competition rules have been infringed will be binding on any court hearing a claim for damages provided that the appeal process, if pursued, has run its course.[155] The idea was that this binding effect would encourage private actions because private parties may be able to avoid inconsistent decisions and predict the result of action.[156] Follow on actions before the CAT must be brought within two years of the relevant date.[157] The relevant date is the later of the date on which the period to appeal to the European Court has lapsed, or if an appeal has been instituted, the date on which it is determined.[158] The CAT may give permission for a claim to be brought prior to the relevant date after hearing from any proposed defendant.

---

[152] Section 47 A CA 1998 was introduced by section 18 EA 2002.

[153] This provision was adopted after much debate, with the Government initially resisting the proposal. The amendment, championed by Sir Jeremy Lever Q.C., was eventually adopted on a division at Third Reading in the House of Lords shortly before the Act received Royal Assent.

[154] See section 1.3.1. 4 which deals with stand-alone and follow-on actions.

[155] Section 58 A, CA 1998 inserted by Section 20 of the Enterprise Act 2002 provides for the binding nature of OFT and CAT decisions. It would have expressly provided that a decision of the EC Commission that there had been an infringement of Art.81(1) or Art.82 was binding upon a national court in proceedings before it for damages, was rejected as unnecessary. The Government considered that such decisions were in effect already binding on UK courts by virtue of Case C-344/98 *Masterfoods Ltd (t/a Mars Ireland) v HB Ice Cream Ltd*: [2000] ECR I-11369; [2001] 4 CMLR 14, para 45-60. The *Masterfoods* judgment is now embodied in Regulation 1/20032003, Art. 16. However, note the attitude of the House of Lords to decisions in 'parallel' cases in *Inntrepreneur Pub Company V Crehan* [2006] UKHL 38, discussed below. If such a decision is the subject of proceedings before the European Court of Justice or the Court of First Instance, the national court may stay its proceedings pending the outcome of the European proceedings, or to make a preliminary reference to the European Court.

[156] Koob et al., supra note 132, p. 4.

[157] Rule 31, CAT Rules.

[158] See Rule 31(2) of the CAT Rules, which refers to sections 47A(7) and 47A(8) of the Competition Act 1998.

Second, the CA 1998 provides for a mechanism for representative actions to be brought on behalf of consumers against businesses which have infringed the competition rules. Representative bodies are able to bring damages actions before the CAT on behalf of two or more consumers. Representative actions are less costly for the consumers and they can enable consumers to bring actions where collectively substantial harm has been caused, although individually they may only have suffered a relatively small harm. Representative actions can create a more streamlined procedure, as the CAT is able to deal with all the claims in a single case.

Third, the UK has a parallel system consisting of the CAT and the ordinary courts. The right to claim before the CAT is not exclusive and does not affect the right to bring other proceedings before the ordinary courts.[159] In England and Wales, therefore, actions may be brought before the High Court for the tort of breach of statutory duty or before the CAT. Proceedings for damages may be transferred between the CAT and the High Court[160] on the initiative of the High Court or on an application by the parties.[161] The Enterprise Act of 2002 enables the Lord Chancellor to make the High Court or any county court transfer damages actions to the CAT it if it is related to a competition law infringement. In considering whether to make an order for transfer, the High Court must take into account whether the CAT is dealing with, or has previously ruled on, a similar claim, or whether it has developed considerable expertise by dealing with a significant number of cases arising from the same or similar infringements.[162]

The CAT offers plaintiffs significant advantages over the High Court. The CAT is better equipped to handle complex legal and economic matters since the CAT has specialist judges, special procedural rules and the regime instituted by section 47A of the Competition Act 1998.[163] Practitioners consider that the CAT is particularly well suited to deal with competition damages actions because it can

---

[159] Section 47A(10) of the Competition Act 1998.
[160] Section 16 of the Enterprise Act 2002.
[161] This applies only to proceedings in which damages for breach of articles 81 and 82 or chapter I and II are claimed, in circumstances where an infringement decision has been made by either the OFT, the Commission or the CAT (in relation to an appeal of an OFT decision).
[162] Section 8.4 of the Practice Directions to the Civil Procedure Rules part 30.
[163] See *Bettercare v Director General of Fair Trading*, Case No. 1006/2/1/01, [2002] CAT 6, paras 90-92 and 161 respectively.

speed up proceedings, reduce costs, avoid inconsistent decisions and contribute to the development of a more stringent line in decisions.[164] The creation of the CAT placed the UK in an advantageous position compared with other Member States in the EU.[165] However, the choice of whether or not to bring damages actions before the CAT or the civil courts rests with the plaintiff. The plaintiff still can go to civil courts after having exhausted all appeal procedures. Most crucially, the CAT procedure is available only for 'follow-on' actions, where there has already been a finding of infringement.

Concern has been expressed by the OFT that more could be done to facilitate private damages actions. The OFT published a consultation paper regarding private redress for competition law infringements in April 2007.[166] This Discussion Paper identified significant barriers to private actions by consumers and small and medium-sized businesses. The OFT's Discussion Paper also outlined principles for any proposals to make private competition law actions more effective and put forward a number of issues and options for discussion.[167]

2.3.2 Characteristics of Private Competition Enforcement in the UK

Although the EC competition law provisions are directly applicable,[168] the direct applicability of the substantive law, alone is not sufficient to encourage private competition enforcement.[169] As discussed above,[170] remedies must be

---

[164] See, for example, Fergus Randolph, Aidan Robertson, "The First Claims for Damages in the Competition Appeal Tribunal", ECLR, 2005, p. 368.

[165] Barry Rodger, "Competition Law Litigation in the UK Courts: A Study of All Cases to 2004 - part I", 27(5) ECLR 241, 2006, p. 242; Jeremy Lever QC, "Effective Private Enforcement of EC Antitrust Rules Substantive Remedies: ; Ilya Segal, Michael Whinston, " Public VS Private Enforcement of Antitrust Law: A Survey", 5ECLR 306, 2007, p. 306.

[166] The Office of Fair Trading, "Private Actions in Competition Law: Effective Redress for Consumes and Business", OFT916, 2007 ; See also Int'l Bar Ass'n Antitrust Comm., Working Group on Private Antitrust Litigation in Europe, "Comments on the Office of Fair Trading Discussion Paper: Private Actions in Competition Law--Effective Redress for Consumers and Business", available at http://www.ibanet.org/images/downloads/lpd/Discussion_Paper.pdf; Alex Potter, Kier Liddell and Simon Constantine, "United Kingdom, in Dominance 2007", ch. 37, p. 217-18.

[167] OFT916 are available at http:// www.oft.gov.uk/shared oft/reports/comp policy/oft916.pdf [Accessed January 22, 2008]. The proposals of the OFT are discussed in the relevant places in the following Chapters of this thesis.

[168] *Courage v. Crehan*, C-452/99, [2001]ECR I-6297; *Manfredi v. LIoyd Adriatico Assicurazioni SpA*, C-295/04, [2006] ECJ, 348.

[169] Koob et al., supra note 132, p.3.

[170] See section 2.2 which deals with overview of private enforcement in the EU.

provided by and under national law damages actions must be brought in the domestic courts of the Member States.[171]

Under English law, damages actions for breach of competition law are framed as a claim for the tort of breach of statutory duty (that is, failure to comply with article 81 or 82 of the EC Treaty).[172] It is a settled principle of English law that actions for breach of statutory duty must show not only that a duty is owed to the plaintiff,[173] but also that it is a duty in respect of the kind of loss he suffered. All claims arising in England and Wales pleading a breach of EC or UK competition law must be issued in or transferred to the High Court and, unless they come within the scope of Rule 58.1(2) of the CPR(in which case they are assigned to the Commercial Court), they are assigned to the Chancery Division.[174]

It is well recognized that private enforcement is important to competition culture and effective competition authorities by supplementing limited public resources. In its proposal paper for giving effect to Regulation 1/2003 and for re-alignment of the Competition Act 1998, the DTI noted: "The development of private enforcement is essential to a vigorous competition culture. Private enforcement allows those who are most directly affected by an infringement of competition law another option for action to obtain a remedy. Its availability allows competition authorities such as the Commission and the OFT to devolve more resources to the detection, investigation and remedying of the most serious infringements, such as cartels."[175]

This statement echoes the sentiments expressed by the European Commission in the preamble to Council Regulation 1/2003.[176]

---

[171] Tim Ward and Kassie Smith, "Competition litigation in the UK", 2005, Thomson, p. 258, 7-008; Koob et al., supra note 132, p.3.
[172] See *Crehan v Interpreneur*,[2004] EWCA Civ 637 para 156. This had previously been thought to be the case following *Garden Cottage Foods LTD v Milk Marketing Board*,[1984] 1 A.C.130; Ward and Smith, Ibid., p. 270, 7-040.
[173] In English law, 'plaintiffs' are now called as 'plaintiffs' but that I retain the word 'plaintiffs' as discussing in England and other jurisdictions as well.
[174] See County Act 1984, sections 41 and 42, and Rule 30.3 of the CPR.
[175] DTI, "Modernisation – A consultation on the Government's proposals for giving effect to Regulation 1/2003 and for re-alignment of the Competition Act 1998", April 2003.
[176] See Council Regulation 1/2003, OJ L 1, Recital 7.

The OFT promoted a policy of facilitating private enforcement of competition law in Discussion Paper where the OFT considered that "most of the main structural and legal elements for effective private actions in competition law are already in place in the UK".[177] Private enforcement of competition rules in the UK is at the forefront of such enforcement in the EU because, *inter alia*, of the comparatively wide discovery rules, and the availability of follow-on proceedings in the CAT.[178] It has been said that "[t]he UK has proven the most aggressive in developing a regime for private competition enforcement." [179] Under the continental (civil) legal systems of many other Member States of the EU, private enforcement of competition law is very much in its infancy.

2.4 Overview of Private Antitrust Enforcement in the US

2.4.1 Introduction of Private Antitrust Enforcement in the US

2.4.1.1 Overview of Antitrust Enforcement in the US

The US enjoys strong competition law enforcement.[180] Congress created a tripartite enforcement mechanism. The first element is the Department of Justice (hereafter, DOJ). The Antitrust Division of DOJ has broad civil and criminal enforcement powers. As a matter of DOJ policy, criminal sanctions are reserved for the worse infringements of law condemned by the courts as per se illegal—price-fixing among competitors and agreements among competitors to divide markets and thereby raise prices.[181] In addition to criminal sanctions, the Antitrust Division may seek treble damages where the federal government has suffered harm by reason of an antitrust violation.[182]

---

[177] OFT916, supra note 166, p.4.
[178] Commissioner Monti believed the creation of the CAT, a specialist tribunal that only hears competition law actions, provides a valuable opportunity for would-be plaintiffs; G. Olsen, "Actions for Damages are Compensation and Deterrence?", C.L.I. 4.8.(3), p. 2.
[179] John H. Beisner, Charles E. Borden, "Expending Private Cause of Action: Lessons from the US Litigation Experience", presented at 「The Trans-Atlantic Challenge: Diverging approaches to regulatory and legal reform in the Untied States and Europe」, Brussels, 2005, p.11.
[180] Maher M. Dabbah, "Measure the Success of a System of Competition Law: A Preliminary View", 21 European Competition Law Review 369, 2000, p.374.
[181] Anne K. Bingaman, Gary R. Spratling, "Joint Address Before the Antitrust Section of the American Bar Association Criminal Antitrust Law and Procedure Workshop" 1995, available at http:// www.usdoj.gov/atr/public/speeches/95-02-23.txt.
[182] 15 U.S.C. § 15a

The second element is the Federal Trade Commission (hereafter, FTC).[183] The FTC was created by Congress in 1914 as an independent federal regulatory agency to administer the FTC Act.[184] The principal operative provision of the FTC Act is section 5, which prohibits *unfair methods of competition.*[185] The FTC consists of a five-member commission appointed by the President that oversees a Bureau of Competition, a Bureau of Consumer Protection, and a Bureau of Economics.[186] The FTC has no criminal powers, nor does it have authority to recover civil damages. The courts, nevertheless, have held that the FTC does have authority to order disgorgement of ill-gotten gains obtained by those engaging in unfair methods of competition.[187] In addition, the FTC is empowered to levy substantial fines against those who fail to comply with FTC orders.[188]

The third element is private enforcement through private parties' actions against antitrust infringements. The US has a fundamentally different attitude to private enforcement from that of the other jurisdictions discussed in this thesis. Private enforcement has played a central role in the US antitrust law regime since the passage of the Sherman Act in 1890.[189]

---

[183] See generally, Robert Pitofsky, "Past, Present, and Future of Antitrust Enforcement at the Federal Trade Commission", University of Chicago Law Review, 2005.; See generally, Charles E. Koob, "Civil Enforcement at the Antitrust Division and Federal Trade Commission: Emerging Patterns?, Simpson Thacher & Bartlett LLP, 2002.; See also generally, David Balto, "Returing to the Elman Vision f the Federal Trade Commission: Reassessing the Approach to FTC Remedies", Antitrust Law Journal, 2005.

[184] Act of Sept. 26, 1914, ch. 311, 38 Stat. 717, 719; 15 U.S.C. §§ 41-58 (2000).

[185] 15 U.S.C. § 45 (2000).

[186] 15 U.S.C. § 41 (2000).

[187] *FTC v. Mylan Labs., Inc.*, 62 F. Supp. 2d 25 (D.D.C. 1999).

[188] *See* Press Release, Federal Trade Commission, Federal Trade Commission Obtains Civil Penalty Against William H. Gates III for Violation of Hart-Scott-Rodino Act (May 3, 2004) (describing how the FTC imposed a civil penalty of $800,000 on Microsoft head Bill Gates for HSR disclosure violations), *available at* http:// www.ftc.gov/opa/2004/05/gates.htm.

[189] Hannah L. Buxbaum, "Private Enforcement of Competition Law in the Untied States- of Optimal Deterrence and Social Costs", in 「Private Enforcement of EC Competition Law」 (ed. by Jürgen Basedow), Kluwer Law, 2007, p. 43; "Charles E. Koob, David E. Vann, Arman Y. Oruc, "Developments in Private Enforcement of Competition Laws- Introduction", Simpson Thacher&Bartlett LLp, 2004 p. 5; Robert L. Hubbard, James Yoon "How the Antitrust Modernization Commission Should View State Antitrust Enforcement",Loyola Consumer Law Review, 2005, p.505; Michael P. Foradas, "Private Enforcement of the Antitrust Laws", Practicing Law Institute, 1988 p. 229 ; Donald I. Baker, Revisiting History – What Have We Learned About Private Antitrust Enforcement That We Would Recommend to Others?, 16 Loy. Consumer L. Rev. 379, 2004, p.382; Katherine Holmes, "Public Enforcement or Private Enforcement? Enforcement of Competition Law in the EC and UK", E.C.L.R. 2004, 25(1), 25-36, p. 25; Clifford A. Jones, "Exporting Antitrust Courtrooms to the World: Private Enforcement in a Global Market", Loyola Consumer Law Review, 2004, p. 409; Michael P. Foradas, "Private Enforcement of the Antitrust Laws", Practising Law Institute Corporate Law and Practice Course Handbook Series, 1988, p. 229.; P. Friedman, D. Gelfand and C. Nordlander etc., "Comments of the Section of Antitrust Law and the Section of International Law of the American Bar Association in Response to the Request for Public

As the US Supreme Court has noted, "Congress has expressed its belief that private antitrust litigation is one of the surest weapons for effective enforcement of the antitrust laws."[190] The Supreme Court has also termed this private right of action "a bulwark of antitrust enforcement."[191] Plaintiffs seeking antitrust damages can be regarded as 'Private Attorneys General' whose activity is encouraged to supplement and substitute for the scarce governmental resources.[192]

2.4.1.2 Rationale for Encouraging Private Antitrust Enforcement in the US

Originally conceived of as a necessary incentive to spur on the private actions, the so-called 'private attorney general' has served a variety of purposes of public interests as well as private interests. Looking at US political history can help us understand why and how the US has ended up with a private antitrust system that is significantly tilted in the plaintiffs' favour.

First, Congress created the private right of action to supplement public enforcement because the government would not have the necessary resources to detect, investigate, and prosecute all infringements of the antitrust laws.[193] Infringement of antitrust laws is recognised as not merely an issue of public harm or a 'victimless crime'[194] addressed by action taken by government agencies on behalf of the public at large. Private antitrust litigation has provided a significant

---

Comment of the Commission of the European Communities On Damage Actions for Breaches of EU Antitrust Rules", April, 2006, p.3.; John H. Beisner, Charles E. Borden, "Expending Private Cause of Action: Lessons from the US Litigation Experience", presented at 「The Trans-Atlantic Challenge: Diverging approaches to regulatory and legal reform in the Untied States and Europe」, Brussels, 2005, p.9; A. Neil Campbell and J.William Rowley, "The Internationalization of Unilateral Conduct Laws—Conflict, Comity, Cooperation and/or Convergence?", 75 Antitrust L.J.267, 2008, p.294.

[190] *Minnesota Mining & Manufacturing. Co. v. New Jersey Wood Finishing Co.*, 381 U.S. 311(1965), 318.

[191] *Perma Life Mufflers, Inc. v. International Parts Co.*, 392 U.S. 134(1968) para 139.

[192] Jones, supra note 66, p. 80; Barry J. Rodger and Angus MacCulloch, "Competition Law Enforcement in the Community. Deregulation and Re-regulation: The Commission, National authorities and Private Enforcement ", 4 Columbia Journal of European Law,1998, p.604; Joseph P. Bauer, 'The Future of Private Right of Action in Antirust: Multiple Enforcer and Multiple Remedy", Loyola Consumer Law Review, 2004, p.310-311.

[193] 15 U.S.C. § 15a (1994) (suits for damages by the United States); See, e.g., *Texas Indus., Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 642 (1981) (explaining that the private action "supplements federal enforcement and fulfils the objects of the statutory scheme").; See David Besanko and Daniel F. Spulber, "Antitrust Enforcement under Asymmetric Information", The Economic Journal, 1989, p. 408.

[194] Victimless crime can be defined as not having identifiable victims in contrast with infringement of securities legislation, such as murder. Some *white-collar* crimes may also not be 'victimless'.

supplement to the public enforcement.[195]

Second, in the US private enforcement is seen as serving as a countermeasure to the large corporate power of defendants. The private plaintiff is considered to need tangible help in attracting lawyers to prosecute antitrust cases against parties likely to be better heeled and better able to manage to successful conclusion an antitrust action because usually, antitrust actions are very expensive. To ameliorate the burden on private parties, Congress has built in powerful incentives such as mandatory treble damages; attorneys' fees for winning plaintiffs (although not for winning defendants); and in cases where a civil action follows a successful criminal prosecution by public enforcers such as the DOJ, the factual findings in the criminal action are given prima facie effect [196]in the civil action.[197] The incentives such as treble damages, discovery, contingency fees and prima facie evidence need to be understood as part of a system that encourages private enforcement. Thus, the characteristics of US antitrust law must be assessed in the context of US policy on the role of private enforcement action.

2.4.2 Basis of Private Competition Enforcement

In enacting the antitrust laws, Congress decreed that competition would be the guiding principle governing commercial intercourse.[198] Competition is regulated by federal and state law. Federal courts generally have limited jurisdiction, but they have broad and exclusive jurisdiction over the federal antitrust laws.[199]

---

195 See *Reiter v Sonotone Corp*, 442 US 340(1979) para 344; Eric McCarthy et al., supra note 63, p.38.

196 Prima facie effect means if public enforcers find a breach of antitrust law, victims of the infringement can rely on this decision to raise a presumption of fact or to establish the fact in question unless rebutted in civil proceedings for damages: The 'Lectric Law Library's Lexicon, available at http://www.lectlaw.com. It is related to what I said in the UK section about the effect of infringement findings in s 47A actions before the CAT because it has prevailing effect even if it does not have binding effect.

197 Prevailing defendants may, however, be entitled to sanctions if the plaintiff's action is frivolous and those sanctions may include lawyers' fees. See Fed. R. Civ. P. 11; see also 28 U.S.C. § 1927 (2000) (allowing sanctions against lawyers for vexatious behaviour).

198 See *Northern Pacific Railway. Co. v. United States*, 356 U.S.1(1958) para 4; ABA Section of Antitrust Law, The State of Federal Antitrust Enforcement: Report of the Task Force on Federal Antitrust Agencies, 2001, p.12 ("[E]ffective and appropriate antitrust enforcement is critical to the performance of a market economy."), available at http://www.abanet.org/antitrust/pdf_docs/antitrustenforcement.pdf .

199 *Gregory v. McCurdy*, "The Impact of Modernization of the EU Competition Law System on the Courts and Private Enforcement of the Competition Laws: A Comparative Perspective", ECLR, 2004 p. 513; Corinne Bergen, supra note 93, p. 203.

Some authors have traced back the roots of US antitrust to England's "Statute of Monopolies" of 1623.[200] They have pointed out that when Congress enacted the Sherman Act in 1890,[201] the framers looked back 267 years to that Statute which had been as a model for private antitrust actions in the US.

The enactment of the Sherman Act was an important political event in 1890. The Supreme Court has stated that the Sherman Act was designed to be a comprehensive charter of economic liberty aimed at preserving free and unfettered competition as the rule of trade:

"The Sherman Act was designed to be a comprehensive charter of economic liberty aimed at preserving free and unfettered competition as the rule of trade. It rests on the premise that the unrestrained interaction of competitive forces will yield the best allocation of our economic resources, the lowest prices, the highest quality, and the greatest material progress, while at the same time providing an environment conducive to the preservation of our democratic political and social institutions. But even were that premise open to question, the policy unequivocally laid down by the Act is competition."[202]

The Sherman Act[203] has also been described by the Supreme Court as the 'Magna Carta of free enterprise'.[204] There are similarities between sections 1 and 2

---

[200] England's Statute of Monopolies of 1623(21 Jac. 1,c.3) repealed, S.L. (Repeals)(1969). The statute provided a civil remedy for victims of prohibited monopolies: "wherein all and every such person and persons which shall be so hindered, grieved disturbed or disquieted ... shall recover three times so much as the damages which he or they sustained ... and double costs." The statute arose out of the Case of Monopolies (*Darcy v. Allein*), 11 Co. Rep. 84b, 77 Eng. Rep. 1260 (K.B. 1602), in which the plaintiff sought to block the defendant from infringing the playing card monopoly that had been granted by Queen Elizabeth; Johan Ysewyn, "Private Enforcement of Competition Law in the EU: Trials and Tribulations", International Law Practice, 2006, p.14; Thomas Greene, "Introduction to the Legal and Economic Issues at the Intersection of the Patent and Antitrust Laws", Sedona Conference Journal, 2007, p.57-58; Harry First, "Controlling the Intellectual Property Grab: Protect Innovative, not Innovators", Rutgers Law Journal, 2007, p.371-376; Jones, supra note 66, p. 35.

[201] Act of 2 June 1890, Ch. 647, 26 Stat. 209 (1890), current version at 15 U.S.C. §§1-7 (1996).

[202] See *Northern Pacific Railway. Co. v. United States*, 356 U.S. 1(1958) para 4

[203] 15 U.S.C. § 1

[204] *United States v. Topco Assocs., Inc.*, 405 U.S. 596, 610 (1972); Clifford A. Jones, "Exporting Antitrust Courtrooms to the World: Private Enforcement in a Global Market", Loyola Consumer Law Review, 2004 p. 409; Jonathan B. Baker, "The Case for Antitrust Enforcement", Journal of Economic Perspectives-Volune17, 2003 p. 27.

of the Sherman Act and Articles 81 and 82 of the EC Treaty.[205] Section 1 prohibits concerted action in unreasonable restraint of trade[206] and Section 2 prohibits anticompetitive conduct that contributes to the acquisition or preservation of monopoly power.[207] The other complementary statute was the Clayton Act[208] introduced in 1914, which contains all relevant provisions for private enforcement.[209] The underlying legislative purpose of the Clayton Act was to create a group of 'private attorneys general' to enforce the antitrust laws under section 4.[210]

Another complementary Act is the Federal Trade Commission Act (hereafter, FTC Act).[211] Congress also passed the Hart-Scott-Rodino Antitrust Improvements Act of 1976[212] (hereafter, HSR) which empowered states' attorneys general to bring the action of parens patriae[213] on behalf of consumers injured in price-fixing cases.

The States also enforce their own antitrust laws. Every State has passed some form of antitrust statute, most of which are comparable to sections 1 and 2 of the Sherman Act.[214] Many states also have passed laws respecting competition and outlawing particular practices (such as bid rigging and predatory pricing).[215] A State may not make lawful conduct made unlawful by the Congress,[216] but a State may prohibit conduct that does not infringe any Act of Congress.[217]

---

[205] See section 2.2 which deals with Articles 81 and 82 of the Treaty of Rome.
[206] 15 U.S.C. §1; *See Standard Oil Co. v. United States*, 221 U.S. 1, 60–70 (1911).
[207] 15 U.S.C. §2
[208] An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes, ch. 323, 38 Stat. 730 (1914), current version at 15 U.S.C. § 12 (1996).
[209] 15 U.S.C.This provision supersedes the former Sherman Act, S. 7. Each of the Clayton Act and the Sherman Act specifically provides for private actions for damages. If the infringement of any substantive antitrust provision causes anyone's loss, this person can bring damages actions for compensation.
[210] The modern private right of action is provided for in section 4 of the Clayton Act, 15 U.S.C. § 15 (1994): [A]ny person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue there for in any district court of the United States ... and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee. ;
[211] Act of 26 September 1914, Ch. 311, 38 Stat. 717 (1914), current version at 15 U.S.C. §§ 41-58 (1996).
[212] Pub. L. No. 94-435, 90 Stat. 1383 (1976).
[213] The government can bring actions on behalf of consumers which is called as *parens patriae*.
[214] "The Three Core Federal Antitrust Laws", An FTC Guide to the Antitrust Laws, 2009, p.1 available at www.ftc.gov; See also Debra J. Pearlstein, Robert E. Bloch and Ronan P. Harty, "Antitrust Law Development", 5th ed, American Bar Association, 2002, p.803.
[215] D. J. Pearlstein, R. E. Bloch and R. P. Harty, Ibid., p.810.
[216] See, e.g., *Northern Securities Co. v. United States*, 193 U.S. 197 (1904) (invalidating state law in conflict with Sherman Act §1).
[217] *See Exxon Corp. v. Governor of Maryland.*, 437 U.S. 117 (1978) (Maryland statute prohibiting producer or refiner of petroleum from operating retail gasoline station not preempted by Clayton Act or Robinson–Patman Act).

2.4.3 Characteristics of Private Antitrust Enforcement in the US

2.4.3.1 Antitrust Injury rule

The basic *antitrust injury rule* articulated by the Supreme Court is that to have standing, a plaintiff must be able to show 'antitrust injury'- in other words, "injury of the type the antitrust laws were intended to prevent."[218] The private plaintiff can only recover under the Clayton Act for economic injury that flows from a lessening of competition. Proving an antitrust infringement is not enough unless the plaintiff's injury flows from a lessening of competition created by the infringement. The point is clearly illustrated by the seminal and unanimous Supreme Court decision in *Brunswick Corp.*[219] In this case, the plaintiffs, a group of bowling alley operators claimed that *Brunswick*, the leading maker of bowling equipment, had made a series of bowling centre acquisitions that were illegal under Section 7 of the Clayton Act because the 'failing company' doctrine had not been properly applied, and that the plaintiffs' centres would have been more profitable if some of the Brunswick-acquired centres had gone out of business or been acquired by 'less anticompetitive' purchasers. The Court rejected this claim, noting that it was the essential survival of the centres that was the basis for the plaintiffs claim. Therefore, to award damages to these plaintiffs would be "inimical to the purposes of these [antitrust] laws."

In a post-*Brunswick* merger decision, the Supreme Court made clear that a firm would only establish antitrust injury, and have standing to challenge a merger of its competitors, if it could show that probable predation flowing from the merger threatened the plaintiff with destruction.[220]

---

[218] *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477(1977) para 489; *Cargill, Inc. v. Monfort of Colorado, Inc.*, 479 U.S. 104, 109-10 (1986); *Atl. Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328, 334 (1990).

[219] *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477 (1977)

[220] See *Cargill, Inc. v. Monfort of Colorado, Inc.*, 479 U.S. 104(1986) para 104.

2.4.3.2 The Number of Private Actions in the US

Private enforcement of antitrust law did not gain momentum until the late 1930s.[221] After for the first 60 year period from 1890 to 1949, there were just over 300 reported decisions and approximately 1,100 cases have been commenced since the Sherman Act was passed.[222] It seems that treble damages actions started after the Supreme Court in the *Bigelow* case,[223] had formulated the rules for the proof of the damages in 1949.

In this case, Bigelow and others brought actions against RKO Radio Pictures, Inc., and others under the Sherman and Clayton Acts for an injunction and to recover treble damages because of defendant's alleged monopolistic practices in exhibiting motion pictures. The jury found a conspiracy for fixing minimum prices.[224] In this case, the crucial issue was proof of the damages. In respect to the rules for the proof of the damages, jury may not render a verdict based on speculation or guesswork but they can make a just and reasonable estimate of the damage based on relevant data. [225]

Private enforcement has played a fundamental role since 1960. There was an explosion in private antitrust litigation starting in the 1960s because of the changes in the rules on class actions. The expansion of the class action device under Federal Rule of Civil Procedure 23, coupled with "appellate court decisions recognizing new substantive rights or easing litigation burdens for plaintiffs pursuing existing rights, encouraged private actions and increased awareness of their possibilities in the antitrust context."[226]

---

[221] See Richard A. Posner, "Antitrust Law"(2nd ed.), University of Chicago Press, 2001, p. 45.
[222] Holmes K., supra note 28, pp. 25, 31; Donald I. Baker, Revisiting History – What Have We Learned About Private Antitrust Enforcement That We Would Recommend to Others?, 16 Loy. Consumer L. Rev. 379, 2004, p.382
[223] *Bigelow v. RKO Radio Pictures*, 327 U.S. 251 (1946)
[224] Ibid., para. 4.
[225] Ibid., para. 6.
[226] Arthur R. Miller, "Of Frankenstein Monsters and Shining Knights: Myth, Reality, and the "Class Action Problem", 92 Harv. L. Rev. 672 (1979) ("The Advisory Committee's objectives in rewriting the [federal class action rule] were rather clear. It had few, if any, revolutionary notions about its work product. Although it was expected that the revision would operate to assist small plaintiffs, the draftsmen conceived the procedure's primary function to be providing a mechanism for securing private remedies, rather than deterring public wrongs or enforcing broad social policies.").

Lin (2000) reports that after 1960, the average over the same period of 19 years is more than tripled to 540 a year on average.[227] The number of private enforcement actions pending has fluctuated greatly, from about 1,400 in the late 1970s to about 750 in the mid to late 1980s, but private actions continue to represent at least 90% of all Federal antitrust cases.[228] In 2003, private enforcement complaints accounted for 90-95% of all antitrust actions.[229] The table below including public litigation and private litigation shows the annual number for civil antitrust filings in federal district courts from 1997 to 2004.[230]

---

[227] For the complete study see Lin et al., "The US Antitrust System and Recent Trends In Antitrust Enforcement", [2000] Journal of Economic Surveys, 14(3), Blackwell Publishers, p. 261, Table 2. The reported numbers in Lin et al. are intimately linked with the case law of *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*, 392 U.S 481 (1968) and *Illinois Brick Co. v. State of Illinois* 431 U.S. 720 (1977). *Hanover Shoe* protected plaintiffs (direct purchasers) by disallowing the defensive use of the pass on argument, and hence private cases thrived. They peak in 1977, the year in which standing to bring actions was restricted to direct purchasers in *Illinois Brick*. Even after standing to bring actions had been limited because of the judgment of *Illinois Brick* private damage actions have persistently outnumbered public cases ever since bringing private actions started in the late 1930's. This is attributable to increasing number of violations but also to the increased incentive to bring actions to direct purchasers in *Illinois Brick*. In respect to *Hanover Shoe,* see section 4.2 which deals with passing on defence in the US. In respect to *Illinois Brick,* see section 5.2 which deals with indirect purchaser actions in the US.

[228] See Patricia Hanh Rosochowicz, "Deterrence and the relationship between public and private enforcement of competition law", Amsterdam Centre for Law and Economics Workshop, 2005, p.6.

[229] In 2003, there were a total of 762 civil antitrust actions commenced in the federal courts. Private filings accounted for 729 of these cases or 95.6% of all such actions. Judicial Business of the U.S. Courts 2003, Table C-2, available at http://www. uscourts.gov/judbus2003/appendix/USDistrictCourtCivil.pdf.

[230] Administrative Office of the U.S. Courts, Federal Court Management Statistics: 2000 – 2005 (available online at http://www.uscourts.gov/fcmstat/index.html).

[Table 1]

Antitrust Cases filed in US District Courts 2001-2007[231]

	Total Federal Civil Antitrust Cases Commenced	Commenced by U.S Government.2	Commenced by Private	Percent of Private Cases
2001	751	44	707	94.1
2002	850	44	806	94.8
2003	773	44	729	94.3
2004	764	33	731	95.7
2005	843	47	796	94.4
2006	1,004	37	967	96.3
2007	1,054	36	1,018	96.6

Nearly 850 district federal courts antitrust cases were filed in the first seven months of 2008.[232]

2.4.3.3 Controversial Features of Private Actions in the US

As shown above in Table 1, private antitrust actions are now overwhelmingly the most common form of antitrust litigation in the US.[233] The US antitrust enforcement scheme seems almost exclusively litigation oriented and mainly dependent on private parties to bring damages actions before court to secure compliance, compensation, deterrence and punishment.[234] Plaintiffs are regarded as

---

[231]Sourcebook of Criminal Justice Statistics Online, Table 5.41.2007, Antitrust Cases Filed in US District Courts, www.albany.edu/sourcebook/pdf/t541 2007.pdf.

[232] Sourcebook of Criminal Justice Statistics Online, Table 5.41.2007, Antitrust Cases Filed in US District Courts, www.albany.edu/sourcebook/pdf/t541 2007.pdf; See generally, Joseph A Ostoyich and Eric Berman, "Trends in Dominant Firm Litigation: Convergence Towards What?", Global Competition Review: The Antitrust Review of the Americas, 2008.

[233] Koob et al., supra note 132, p.1; K. Holmes, supra note 28, p. 25.

[234] See Federal Judicial Caseload Statistics, Table C-2: U.S. District Courts--Civil Cases Commenced, by Basis of Jurisdiction and Nature of Suit, During 12-Month Period Ending March 31, 2002, available at http:// www.uscourts.gov/caseload2002/tables/c02mar02.pdf (last visited Mar. 2, 2004); Jones, supra note

a 'private attorneys general' which supplements scarce governmental resources. Private plaintiffs are thought to be performing:

"[A]n important failsafe function[235] by ensuring that legal norms are not wholly dependent on the current attitude of public enforcers or the vagaries of the budgetary process and that the legal system emits clear and consistent signals to those who may be tempted to offend. Absent private enforcement, potential defendants would have a considerably stronger incentive to lobby against public enforcement efforts or to seek to curtail funds to public enforcement agencies."[236]

, The US legal system has mechanisms which help to ensure effective private enforcement. For instance, as in *Bell Atlantic Corp. V. Twombly*,[237] the US Supreme Court required pleadings to contain "enough facts to state a claim to relief that is plausible on its face." [238] The Supreme Court's decisions in *Twombly* raised the baseline pleading standard for all civil litigation.[239] The plausibility pleading standard can give judges substantial discretion at the threshold stages of litigation.[240] In *Sinaltranial* appeal case, the court adopted *Twombly*'s pleading standard for this scrutiny.[241] The plaintiffs should arrive in federal courts with enough information to convince judges that their allegations are plausible because of *Twombly* judgment. Furthermore, as in *Swierkiewicz* case, in discrimination cases, precedents can require a plaintiff at the summary judgment[242] stage to produce either direct evidence of discrimination or, if the claim is based primarily on circumstantial evidence, to meet the shifting evidentiary burdens imposed under the framework articulated in *McDonnell Douglas Corp. v. Green*.[243] Simplified

---

66, p.19.

[235] Failsafe function of private enforcement is private plaintiffs are thought to do an important role to prevent antitrust practices by ensuring that legal norms are not wholly dependent on the current attitude of public enforcers or the vagaries of the budgetary process and that the legal system emits clear and consistent signals to those who may be tempted to offend, C. Coffee, "Rescuing the Private Attorney General: Why the Model of the Lawyer as Bounty Hunter is not Working" 42 Md. L. Rev. 215, 1983, p.227.

[236] Ibid.

[237] *Bell Atlantic Corp. v. Twombly*, 127 S. Ct.1955(2007)

[238] *Bell Atlantic Corp. v. Twombly*, 127 S. Ct.1955, 1974(2007).

[239] *Bell Atlantic Corp. v. Twombly*, 127 S. Ct.1955, 1974(2007).

[240] *Bell Atlantic Corp. v. Twombly*, 127 S. Ct.1955, 1965(2007)

[241] *Sinaltrania*, 2009 WL 2431463, at 3.

[242] Rule 56 motion for summary judgment.

[243] *McDonnell Douglas Corp. v. Green*, 243 411 U.S. 792, 93 S.Ct.1817, 36 L.Ed.2d 668(1973).

notice pleading standard of the Federal Rules[244] relies on liberal discovery rules and summary judgment motions to define disputed facts and issues and to dispose of unmeritous claims.[245]

However, the US has been described as earning the reputation of having a litigation culture that permeates its entire legal system.[246] The private right of action has been a persistently controversial feature of US antitrust law because critics claim that there are extraordinary opportunities for abuse that can ultimately overwhelm the benefits.[247] It is an extraordinarily powerful weapon for a plaintiff to wield against a defendant. Such powerful weapons can create the potential for abuse, which in turn creates a need for safeguards. American law, however, is often criticised as having failed to ensure appropriate safeguards against actions which could be result in abuse of litigation caused by strong incentives such as treble damages, contingency fee, class actions, broad discovery, and so on.[248] Thus, there has been a great deal of debate in the US about necessary reforms that could curb this abuse of litigation. The Class Action Fairness Act (hereafter, CAFA) was one piece of legislation which has resulted. I consider the CAFA in Chapter 5 where I discuss indirect purchaser actions and Chapter 6 where I discuss group actions.

2.5. Conclusion

This Chapter has set out the main features and characteristics of the competition laws in Korea and in the three other jurisdictions at which this thesis is looking. It has indicated the main outlines of the existing systems of private enforcement in each of those jurisdictions. The following Chapters examine particular issues in private enforcement in each jurisdiction in order to come to a conclusion as to the best rules that Korea could develop in order to achieve its goal of optimal enforcement of its competition laws.

---

244 Federal Rules 8(a)(2)
245 *Swierkiewicz*, 534 U.S., at 511, 122 S.Ct, 992.
246 Eric McCarthy et al., supra note 63, p.38.
247 Arthur R. Miller, supra note 226, p.672.
248 John H. Beisner, Charles E. Borden, supra note 189, p. 21-26.

Chapter 3. The Principle of Compensation for Damages

3.1 What is Anticompetitive Damage?

3.1.1 Overview of Anticompetitive Damage

In Chapter 1 it was seen that private competition law enforcement can be used in two ways, as a shield and as a sword.[1]

Private damages actions are a sword. It is argued that they can be an important tool in the effective enforcement of competition laws because they can contribute to the correction of the harmful effects of anticompetitive activities and complement public enforcement.[2] The current EU Commissioner for competition has reiterated that it is important to have a just and efficient system for victims to claim damages.[3] The creation of a more effective legal framework for private enforcement might be expected to result in a greater number of damages actions.

As a general rule, most jurisdictions require that in order to be compensated for the infringement of competition law, the plaintiff must prove an *infringement of competition law*, *damage*, and a *causal link* between the breach of the competition rules and the damage caused by the infringers. Therefore, the first thing to be considered is what kind of damage should be compensated. Namely, what is the appropriate scope of damage that victims of competition law infringements should be able to recover? However, it is not easy to define what kind of damage should be recovered. In this Chapter I discuss two major characteristics of anticompetitive damage and then based on these characteristics I will attempt to define anticompetitive damage.

---

[1] See section 1.3.1 which introduces private and public competition enforcement.
[2] Andrew I. Gavil, "Federal Judicial Power and the Challenges of Multijurisdictional Direct and Indirect Purchaser", Antitrust Litigation, 69 George Washington Law Review 860, 2000, p. 860.
[3] Neelie Kroes. "Enhancing Actions for Damages for Breach of Competition Rules in Europe", Dinner Speech at the Harvard Club, Speech/05/533, New York, 2005, p.3.

3.1.2 Characteristic of Anticompetitive Damage

3.1.2.1 Damage under Competition Law and Damage under Tort (or Civil) Law

The difference between liability for the infringement of competition law and liability under tort law (or civil law)[4] is important because competition law has its own characteristics differentiated from those of tort law (or civil law).[5]

Competition damage is sometimes different from most tort damage (or civil damage) because, as discussed in Chapter 1,[6] competition law has the public interest aspect of protecting *competition* and *consumer welfare* as well as the *private aspect* of protecting individual interests.[7] Traditional tort law is seen as individualistic in origin whereas competition law starts from the basis of the public interest, but in fact in both cases there are both public and private interests involved. Tort law also has a public welfare aspect. For instance, in English law, the tort of public nuisance requires damage to the public before an individual can bring private proceedings. Economic theorists would argue that personal injury tort claims exist to deter conduct which causes accidents, ie the aim is the public interest one of reducing levels of harm. However, despite this it is submitted that the primary objective of tort law is to protect private parties' interests.

In principle, infringements under competition law can include any anticompetitive activities such as price-fixing, market division, refusal to deal, tying or exclusive dealing arrangements, price discrimination and unlawful mergers and so on. However, an agreement or practice might cause harm to certain persons such

---

[4] In Korea, there is no branch of law known as 'tort' law because Korea has a 'continental' legal system similar to Germany and France. Illegal conduct caused by a breach of statutory law is regulated by the Civil law. Korean Civil law is composed of Property, Contract and Family law. In respect to damages actions, the Contract section includes provision of damages actions against illegal behaviour. This provision of damages actions is a fundamental part of Korean law and it can be applied to damages actions under competition law if there are no other special or exceptional provisions.

[5] From this, I will mention only Tort law instead of Civil law. See generally, Jonathan B. Baker, "The Case for Antitrust Enforcement", Journal of Economic Perspectives-Volune17, 2003, p. 40; and, Spencer Weber Waller, "Prosecution by Regulation: The Changing Nature of Antitrust Enforcement", Oregon Law Review, 1998.

[6] See section 1.2.2 which deals with objectives of competition law.

[7] See section 1.2.2 which deals with the objectives of competition law; In relation to Korean tort damage, see generally, Kwac Yun-Gik, "Law of Obligations", Parkyoungsa, 2001.

as competitor, customer, or contractor and still may not be considered anti-competitive because a defendant's illegal conduct has no general impact on competition in the market.

For example, the overcharge caused by an output restriction of a dominant company is an anticompetitive injury, as lost profits are associated with exclusionary practices. But other types of harm caused by anticompetitive infringements may not qualify for damages to compensate for anticompetitive activities. These may be legal wrongs under tort or contract law but they could not be regarded as competition law infringements because these legal wrongs may not affect competition in the market. It is always necessary to bear in mind the objectives of competition law, as discussed in Chapter 1. As explained there, in Korea this public aspect of competition law has been clearly shown by the Competition Law[8] which states that the objective of this Act is to promote *fair competition*, [9] to *protect consumers*,[10] and to strive for *balanced development* of *economy*. So anticompetitive conduct harms public interests such as competition or consumer interests as well as private interests. [11] Therefore, to be compensated for anticompetitive conduct, the anticompetitive conduct must harm public as well as private interests.

Korean courts have limited the scope of anticompetitive liability by an *anticompetitive injury doctrine*.[12] The *anticompetitive injury doctrine* requires an infringement of the competition rules but it does not necessarily require the occurrence of harm to a *person*. Therefore, even though the defendants may have acted anticompetitively, if the defendants' practice does not have anticompetitive

---

[8] See section 1.2.2.1 which deals with objectives of competition law in Korea.

[9] In Korea, *fair competition* is one of the most important objectives of competition law. As I discussed in chapter I(Introduction), 'Fair competition' could be defined as ensuring competition by price and quality of product and preventing other factor such as monopolization and cartels from affecting competition. This concept of 'fair' competition is different from 'free' competition because free competition means there is no barrier for competition in market. In respect to definition of 'fair' and 'free' competition, see Kwon Oh-Sung, "Competition Law"(5th ed.), Bubmoonsa, 2005, pp. 79-80: Shin Hyun-Yun, "Competition Law"(2nd ed.), Bubmoonsa, 2007, pp. 129-131.

[10] To protect consumer, the KFTC has made decisions and policies to enhance *consumer welfare* or to minimise *consumer detriment*., See section 1.2.2.1 which deals with objectives of competition law in Korea.

[11] Mark Furse, "The Role of Competition Policy: A Survey", 17(4) E.C.L.R. 250, 1996, p.257.

[12] Supreme Court 90.4.10, 89DACA29075.

effects, the plaintiffs cannot have compensation for damages under the competition rules. This is shown in Korean case law. The Korean, Supreme Court held that:

"Damage from an anticompetitive infringement is not necessarily the one suffered by the injured party or parties but the general damage to competition of economy or the loss to consumer welfare because the Competition Law protects public interests such as competition or consumer welfare not competitor."[13]

It is submitted that this *anticompetitive injury doctrine* is sound because it limits damages to harm connected to the rights protected by the Competition Law. The right to relief should be limited by the anticompetitive injury doctrine, which restricts the right to recover to harm to competition not harm to competitors. Thus, the question is whether a particular conduct gives rise to the type of anticompetitive damage the Competition Law is designed to prevent. The broader the law's definition of harm to competition is the more damage will be compensated. This doctrine is the tools by which courts identify which victims of a competition infringement may recover damages, given the nature of the victim's harm.

Anticompetitive injury doctrine issues have been also discussed in the US context where there is an *antitrust injury doctrine.*[14] This doctrine has been recognized in *Brunswick.* In this case, the Supreme Court, stated that:

"The antitrust laws were enacted for 'the protection of competition not competitors'."[15]

---

[13] Supreme Court DACA 2001. It is my own translation.

[14] In respect of the antitrust injury doctrine and the related doctrine of antitrust standing, see William H. Page, "The Scope of Liability for Antitrust Violations", 37 Stan. L. Rev.,1985, p.1445. For criticism of some judicial applications of the antitrust doctrine, see Ronald W. Davis, "Standing on Shaky Ground: The Strangely Elusive Doctrine of Antitrust Injury", 70 Antitrust L.J.,2003, p. 697, 723; Roger D. Blair and William H. Page, "Controlling the Competitor Plaintiff in Antitrust Litigation", 91 Mich. L. Rev. 111, 1992; see also Joseph P. Bauer, "The Stealth Assault on Antitrust Enforcement: Raising the Barriers for Antitrust Injury and Standing", 62U.Pitt.L.Rev., 2001, p. 437; With respect to comparative analysis of antitrust doctrine between the US and the EU see Douglas H. Ginsburg, "Comparing Antitrust Enforcement in the United States and Europe', 1 J. Competition L. and Econ., 2005, p. 427, 436; Donald I. Baker, "Revisiting History – What Have We Learned About Private Antitrust Enforcement that We Would Recommend to Others?", 16 Loy. Consumer L. Rev.379, 2004 , p. 390 ; In respect of the antitrust injury doctrine and optimal enforcement see William H. Page, "Optimal Antitrust Penalties and Competitors' Injury", 88 Mich. L. Rev., 1990, p. 2151.

[15] *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477 (1977) para 488. In saying this Supreme Court was expressly quoting itself in *Brown Shoe Co. v. United States*, 370 U.S. 294(1962) para 320.

It also stated that:

"We therefore hold that for plaintiffs to recover treble damages on account of s 7 violations, they must prove more than injury causally linked to an illegal presence in the market. Plaintiffs must prove antitrust injury, which is to say injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful. The injury should reflect the anticompetitive effect either of the violation or of anticompetitive acts made possible by the violation. It should, in short, be 'the type of loss that the claimed violations...would be likely to cause."[16]

These doctrines of Korea and the US have common feature. There are common features in this specialised area such as competition law which mainly deals with economic policy. For example, US and Korean law are different in areas such as family law but it is submitted that the cultural gap may not be so great on the issues of commercial law and economic policy.

However, as I am going to discuss, Korea has very important differences in matters of the organization of the legal system such as lawyers' fees and the amount of damages compensated for.

3.1.2.2 Financial Gain and Economic Loss

The natural or legal person committing the anticompetitive infringement will normally have a financial gain in mind. His objective is to maximize his profit and not to cause the damage for its own sake. Usually, the competition gain corresponds to damage suffered by the injured party. However, such a gain does not have to be equal to the loss for the injured party, but can be either smaller or larger.

For instance, in cartel cases, the total loss to the individuals who are exposed to the competition restriction can by far exceed the infringers' total gain because of

---

[16] *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477 (1977) para 489.

social deadweight loss.[17]

"Economic loss" generally refers to financial detriment that can be seen on a balance sheet but not physically. Economic loss is then divided into 'consequential economic loss' which arises directly from some physical damage or injury (e.g. loss of earnings from having your arm cut off) and 'pure economic loss' which is everything other.

In Korea, damages recoverable under the Competition Law include all head of damage which are awardable. Economic and non- economic loss can be compensated.[18] However, the loss caused by anticompetitive conduct is almost always *pure economic loss*. Damage to other interests such as property or body integrity is improbable to occur as a consequence from an infringement of competition rules. Thus, in competition cases, there is a high probability that any damages will be awarded for pure economic loss.

It is submitted that in the EU, Community law already required the compensation of pure economic loss in the context of damages actions against Member States for failure to fulfil their Treaty obligations, as in *Brasserie du Pêcher* which is a case on damages against Member States.[19] In this case, the Court of Justice stated that:

"Reparation from Member States for loss or damage caused to individuals as a result of breaches of Community law must be commensurate with the loss or damage sustained. In the absence of relevant Community provisions, it is for the domestic legal system of each Member State to set the criteria for determining the extent of reparation. However, those criteria must not be less favourable than those applying to similar claims based on domestic law and must not be such as in

---

[17] As I discussed section 1.4.3, 'deadweight loss' is the loss to plaintiffs arising out of their inability to buy the product due to its artificially high price. Social deadweight is sum of deadweight loss. Social deadweight loss can be estimated as difference between social welfare in competitive market price and social welfare in anticompetitive market price such as monopolized market price. Social deadweight loss is important under competition law because anticompetitive conduct can impair public interest such as social welfare. In respect to social welfare see Chapter 1.

[18] Competition Law 56(Damages actions against anticompetitive conduct)

[19] *Brasserie du Pêcheur v Bundesrepublik Deutschland and The Queen v Secreratary of State for Transport Ex p. Factortame,* Joined Cases C 46 & 48/93, [1996] ECR I-1029.

practice to make it impossible or excessively difficult to obtain reparation. National legislation which generally limits the damage for which reparation may be granted to damage done to certain, specifically protected individual interests not including loss of profit by individuals is not compatible with Community law. Moreover, it must be possible to award specific damages, such as the exemplary damages provided for by English law, pursuant to claims or actions founded on Community law, if such damages may be awarded pursuant to similar claims or actions founded on domestic law."[20]

In conclusion, competition harm has, generally, the nature of pure economic losses, as its main effects are likely to be increases in prices and/or loss of business opportunities for the competitors of the competition infringer.

3.1.3 Definition of Anticompetitive Damage

I would define anticompetitive damage as a loss of a legally protected interest or position caused by a restriction or distortion of competition. The measure of damage that an individual (or firm) sustained as a result of an infringement of competition law is the financial difference between the positions with and without the infringement.

Anticompetitive damage is the difference between the total profit that could reasonably be expected throughout the duration of the infringement and the total profit if it had not taken place. It can be a something that has been lost as a result of the anticompetitive conduct or it can be a loss of future earnings if unlawful conduct could impair the possibility of earnings in the future. A loss of future earnings ought to be reasonably foreseeable because the damage must be certain and existing.[21]

---

[20] Ibid., para.5.

[21] In respect to a loss of future earnings, see section 3.2.1 which deals with Korea cases related to future earning.

3.2. If there is compensable anticompetitive damage, what should be the principle of compensation for damages?

If compensable anticompetitive damage exists, the key question is that what the criteria of damage are. Namely, what is the right measure of damages to be awarded? Should the measure of damages be the loss to victims, the illegal gain of the infringers, or a sum calculated to punish the infringers? Which measures are the better criteria for recovery of damage?

Compensatory damages are to compensate the plaintiff for the loss he (or she) has actually suffered. When court orders compensation it orders the defendant to compensate the plaintiff for his loss.

The legitimacy of *exemplary* (or *punitive*) *damages*, on the other hand, is based on ideas of punishment, deterrence and wider social goals.[22] Exemplary damages bear no relation to loss or gain. Exemplary damages may be imposed by the judge powering order to sanction the defendant.[23] A legal system may make exemplary damages available when there is the need for something more than compensatory award.[24] It is possible to have a system of *multiple damages* (such as the treble damages system in the US) whereby the amount of damages needed to compensate the plaintiff is multiplied by a certain factor to provide for deterrence and/or punishment. Multiple damages may also operate as a way of making the defendant disgorge illegal gains.

Remedies in *restitution* are based on the concept of the defendant giving back what he has obtained from the plaintiff. Unlike remedies in tort, which are founded on the principle of compensation, restitution is based on the principle of recovery. However, there are complications where the plaintiff has made use of the

---

[22] See Lord Hailsham in *Broome v Cassell & Co* [1972] A.C. 1027; See also case *Cooper Industries v. Leatherman Tool Grp.*, 532 U.S. 424 (2001); see also case *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974). In this case "Punitive damages are not compensation for injury... but are private fines levied by civil juries to punish reprehensible conduct and to deter its future occurrence"; see W. Page Keeton et al., "Prosser and Keeton on the Law of Torts" 5th ed. 1984, p.9. In this book, he explained that punitive damages are awarded to punish the defendant, to teach the defendant not to "do it again," and to deter others from similar behaviour.

[23] Jürgen Basedow, "Private Enforcement of EC Competition Law", Kluwer Law, 2007, p.17.

[24] Jenny Steele, "Tort Law: Text, Cases, and Materials", Oxford, 2007, p.540.

defendant's property to make a profit. *Restitutionary damages* are aimed at forcing the defendant to give up what he has gained at the plaintiff's expense. Therefore the plaintiff not only recovers what he lost but also the profit made with it. Restitutionary damages are sometimes called *disgorgement damages*. There is much controversy about whether such a gain-based remedy should really be called damages at all.[25] In this thesis, however, the remedy will for ease of discussion be treated as a form of damages called 'restitutionary damages'.

In respect to deciding what is the best type of damages to be awarded in competition cases, it is therefore worth considering whether the infringer should compensate the plaintiff for the loss it has suffered, punish the wrongdoer, or disgorge illegal gain which has been obtained through his anticompetitive activity. In the next sections, I discuss which approach is taken in the jurisdictions I am considering and, in the light of this, which approach is preferable and in particular which would be best for Korea.

3.2.1 The Current Situation in respect of the principle of compensation for damages in Korea

In Korea the principles governing compensation for breach of competition law are normally the same as those in the general civil law.[26] The general principle of damages under Civil Law is that compensation is awarded in terms of the damage actually incurred.[27] Damages actions can be seen as being compensatory in nature to promote private interests and to ensure the protection of an individual right. Damages are not intended to have a deterrence or punishment effect over and above compensation for damage. There is a general ban on exemplary damages since the primary aim of damages is compensation.[28]

---

[25] See for example the discussion by the UK Law Commission in *Consultation Paper No. 132, Part VII, Restitutionary Damages*; Peter Cane, "The Anatomy of Tort Law", Oxford: Hart Publishing, 1997, p.11-13

[26] As I already discussed Korea does not have Tort law. All provisions related to damages actions are under Civil Law.

[27] Kwac Yun-Gik, "General Principles of Obligations Law", Parkyoungsa, 2005, p.108; Kim Hyung-Bae, "General Principles of Obligations Law", Parkyoungsa, 1999, pp.245-246; Song Deok-Soo,"New Lecture on Civil Law"(3rd ed.), Parkyoungsa, 2010, p. 943; Gi Won-Lim, "Lecture on Civil Law"(5th ed.), Hongmunsa, 2007, p.907

[28] It is not expressly proscribed by the law, however, the primary aim of damages is compensation. Lee,

Following this general principle, in Korea, damages are awarded for the loss suffered by the plaintiff as a result of the anticompetitive conduct of a defendant. It can be argued that basing recovery on the plaintiff's loss rather than the illegal gain generally has worked well[29] because it aligns incentives for bringing an action with the parties most affected by the infringement, as they have the most to gain from a successful action. It also avoids difficult questions that determine whether an infringer has benefited from an illegal conduct and how to allocate any recovery of the defendants' illegal gain among plaintiffs.

In this point, the roles of damages actions are different the roles of public enforcement. As already explained, the public interest is pursued by public enforcers and private interests are pursued by private parties through damages actions.[30] The courts have never required damages to be paid in excess of the amount of actual loss in order to punish. Nothing in the case law in respect of competition damages actions suggests that compensation for damage requires the introduction of remedies that allow a plaintiff to recover damages in excess of the losses actually suffered. Plaintiffs can recover only actual damages for infringements. In this way, the courts seem to be adjusting the normal civil law practice to take account of the particular nature of competition law because usually, civil law recognizes actual loss.

While it is difficult to see Korea easily accepting the concept of exemplary damages,[31] Korea has the concept of *full compensation.*[32] Full compensation means plaintiffs should be fully compensated for the harm they have suffered. The compensation should cover both the effective loss (damnum emergens) and the gain that the victim could have obtained (lucrum cessans). For full compensation, courts have taken into account both the gravity and duration of damage sustained to quantify damage.[33] To ensure full compensation, Korean Civil Procedure Law

---

Byung-Ju, "The harmonization of public and private enforcement: A Korean Perspective", 5th Seoul International Competition Forum, 2008, p. 5-6.

[29] See below Korea cases, Jung San, Sam Jin and Aloes. These cases are based on compensation for loss. In Korea, usually, recovery is based on loss because it has worked well.

[30] See section 1.3.1.2 which deals with role of private and public enforcement.

[31] See generally, Shin Hyun-Yun, supra note 9, pp.405-412. In this book, Prof. Shin insists that compensation for anticompetitive conduct should be compensatory not punitive or exemplary. Kwon Oh-Sung, supra note 9, p. 476: Chung Ho-Yul, "Competition Law"(2nd ed.), Parkyoungsa, 2008, pp. 484-485.

[32] Civil Law 750(Damages actions)

[33] Civil Procedure Law 207; Supreme Court, (1987.5.26), 86DACA1876.

allows inflation in maintaining the value of damage. Courts also have considered factors such as inflation that reduce the value of compensation in calculating damages. Plaintiffs are able to obtain compensation for those elements of damage that can not be limited, such as capital loss caused by inflation.[34] The award of interest in cases of damages for infringements has been also declared essential by the Supreme Court as an element of full compensation.[35] Compensatory interests for the period between the occurrence of a specific damage and the judgment ordering compensation should be taken into account as loss of monetary value.[36]

Even though he must be fully compensated, a plaintiff may be under a duty to mitigate his loss.[37] Courts should ensure that reparation shall not be in full if the plaintiff has been guilty of contributory negligence or/and, being under duty to mitigate the damaged sustained, has not done so in an appropriate manner.

Well-established case laws show that persons infringing competition law must pay compensation to victim for damages caused by illegal conduct. The following three leading cases illustrate how the principles are applied.

A. Jung San co. Case

This case concerned a vertical contract between the plaintiff and defendant. Jung San co. (hereafter, Jung San) is a company which manufactures and sells cosmetics. Jung San made a reseller agency [38]contract with the plaintiff. The agreement contained territorial restrictions and price restrictions. Therefore the plaintiff (like Jung San's other resellers) could resell the cosmetics only in certain districts and at a designated price. The plaintiff, who had the right of re-selling the cosmetics in Ilwon district of On Yang city, broke the contract and sold the cosmetics at a lower price than designated and outside the Ilwon district. The Jung San warned the plaintiff that if it persisted in this breach of the contractual terms then Jung San would cease to supply him with cosmetics. In this case, there is

---

[34] Supreme Court, (1987.5.26), 86DACA1876
[35] Supreme Court, (1966.10.21), 64DA1102; Supreme Court, (1975.7.27), 74DA1393.
[36] Civil Procedure Law 109
[37] Civil Law 750(Damages actions)
[38] The 'agency' was in fact an independent distributor. It is different from genuine agency agreements which are considered that the two parties form one economic entity in EU law.

causation between infringement and damage.[39]

The decision of the KFTC[40]

The plaintiff made a complaint to the KFTC. The KFTC brought proceedings and made a decision that the contract infringed the Competition Law 23(5)[41] because of the territorial and price restrictions. Armed with the decision of the KFTC, the plaintiff brought damages actions before the court. Before the revision of the provision on damages actions (Competition Law 56) legal or natural persons could only bring damages actions before the courts following an infringement decision of the KFTC (ie only 'follow-on' actions were available). In 2004, this provision was revised to allow plaintiffs to bring 'standalone' damages actions before courts without any decision of infringement of the KFTC.[42]

Judgments of the High and Supreme Courts

In respect to the damages action, four main issues can be identified. Firstly, whether the defendant' conduct infringed Competition Law23 (5) [43] or whether the defendant has justified reasons not to supply cosmetics to plaintiff. Secondly, what is the effect of the decision of infringement of the KFTC. One important issue was whether, even though the KFTC had found an infringement, the court could decide that the refusal to supply was justified. The Supreme Court answered this question.[44] Thirdly, what kind of damage can be recognized and fourthly, how to calculate the damages.

---

[39] This is the conclusions of the KFTC and courts.
[40] KFTC decision(1987) NA726
[41] Competition Law 23(5) Contract restricting district or price is illegal.
[42] See section 2.1.1.3 which deals with the current situation of private competition enforcement in Korea. See also section 1.3.1.4 which deals with the stand-alone/follow-on action. Before the revision of provision of damages actions (Competition Law 56) with the only the decision of infringement of the KFTC, legal or natural person can bring damages actions before courts. In 2004, this provision was revised to bring damages actions before courts without any decision of infringement of the KFTC.
[43] Competition Law 23(5)
[44] See judgement of Supreme Court of this case below.

High Court judgment[45]

With regard to first issue, the defendant insisted it had justification for not supplying cosmetics to the plaintiff because the cosmetics were organic, and therefore needed special preservation and treatment. It claimed the plaintiff sold these special cosmetics at a lower price than contracted and did not treat them appropriately, which caused damage to consumers because the cosmetics were spoiled. The defendant claimed it could face damages actions brought by consumers for damage caused by plaintiff's behaviour.

The defendant argued that these cosmetics needed special treatment or that the plaintiff's lower price restricted 'competition' or impaired consumer 'interests' by spoiling the quality of the cosmetics. The High Court did not accept the arguments of the defendant because there was no evidence of restricting competition or impairing consumer interests. On the contrary, the plaintiff's lower price benefited consumers. Therefore, the High court made the decision that the defendant should compensate the plaintiff reseller agency for the damage caused to it through restricting its business. The High court also held that it restricted competition in cosmetic market.

The High court also made a decision on the amount of damages. The damage was to be measured from the day the defendant stopped supplying cosmetics to the day when the reseller agency contract between plaintiff and defendant would have expired. Therefore the court decided that the plaintiff could get damages in respect of the period from 19.11. 1986 to 30.9. 1987, in total 10 months and 12 day.

From the day the plaintiff opened the reseller agency to the day it closed this agency, the plaintiff's total income was 3,780,000 Won[46](average monthly income 2,346,402 Won×1month and 15days). Therefore, the total damages were 8,967,254 Won, which is the average monthly income (2,346,402 Won) multiplied by the above period, 10 months and 12 days from which subtracted the average monthly cost (1,484,166Won) for the same period. The court's calculation was as follows:

---

[45] High Court (1989.10.13) 89 NA18711

[46] According to current exchange rate £ 1≒2,023Won(July. 9).

{2,346,402×(10+12/30)}- {1,484,166×(10+12/30)} = 8,967,255 Won

The Supreme court Judgment[47]

The Supreme Court also agreed with the decision of High court. The Court recognized that when the undertakings made the reselling contract restricting the district where the goods could be resold and the price that could be charged, the contract was illegal because it restricted competition. When the defendant did not supply the product because the plaintiff sold at a lower price than contracted, it was behaving anticompetitive and thus illegally. Therefore, the defendant had liability to compensate the plaintiff for damage caused by termination of contract.

B. Sam Jin Co. Case

This case is also about a vertical contract between the plaintiff and defendant. The defendant was the enterprisers' association[48] making and selling tofu, which is made of beans. The plaintiff, Sam Jin food co. (hereafter, Sam Jin) was a member of the defendant association. The defendant supplied the beans, the ingredient of tofu, to the plaintiff at a price that was cheaper than the wholesale market price. The defendant also made a contract with the plaintiff restricting the district and price as in the previous case. The plaintiff sold beans supplied by defendant to consumers. It also made and sold tofu which is made of beans supplied by defendant to consumers. Sam Jin broke the contract and resold beans as less than the stipulated resale price. The contract did not stipulate the price of the finished product, tofu. However, if the defendant does not supply beans, the plaintiff cannot make tofu and will suffer damage from not being able to make and sell tofu. The defendant expelled the plaintiffs from the association and did not supply 50,150Kg beans.

---

[47] Supreme Court Case (1990.4.10) 89 DACA29075

[48] Competition Act 2(Definition) (1) The enterpriser refers to an person who operates a manufacturing business, a service business, or any other business. (4) The term *enterprisers association* means a juristic person or federation that is organized by two or more enterprisers for the purpose of promoting their common interests, regardless of the organization's form. It is an official translation.

The KFTC decision[49]

The plaintiff made a complaint to the KFTC which found that the defendant had restricted the districts into which the goods could be resold and the resale price thus infringing the Competition Law 23(5). It made a decision of infringement and issued a corrective order of supplying beans to plaintiff. The plaintiff then brought damages actions before court based on decision of infringement of the KFTC.

Judgments of High and Supreme Court

The High Court Decision[50]

The High court gave a judgment finding an infringement because the defendant's practice restricted competition, and therefore it infringed the Competition Law 23(5). Therefore, the defendant was liable to compensate the plaintiff in damages according to the Competition Law 56.

The High Court also decided the amount of damages. The amount of damages was the price (per kg 975 Won) the plaintiff had to buy bean in the wholesale price after subtracting the price (per kg 440 Won) at which the defendant supplied it, multiplied by the amount (18,750 kg) the plaintiff bought. Therefore, the amount of damage was 535(Won)×18, 750 kg = 10,031,250 Won. High Court did not recognize foreseeable income by selling Tofu. However, if defendant had supplied more beans to plaintiff, it could have made more money by both selling beans and Tofu.

The Supreme Court Decision[51]

In this case, the decision of Supreme Court is very significant because it laid down important rules about the calculation of damages and the amount plaintiffs should recover.

---

[49] KFTC decision(1988) NA814
[50] High court (8.11.1990) 90 NA25586
[51] Supreme court (1991.5.19)90DA17422

The Supreme Court agreed with the decision of infringement of the High Court. However, it did not agree with the decision of High Court about the amount of damage. The Supreme Court, unlike the High Court, recognized *foreseeable income* i.e. the future profit which would have been gained but for infringement. It held that the difference between the prices (per kg 440Won) the defendant supplied and the wholesale price (per kg 975) was substantial and the plaintiff could have made more income if he could have obtained beans from the defendant because plaintiff could make more Tofu at a cheaper cost and sell it to consumers.

Therefore, the amount of damage was the market wholesale price (per kg 975) subtract the price (per kg 440 Won) the defendant supplied and was multiplied the amount (50,150kg) the plaintiff was expected to buy from defendant to make Tofu. Therefore, the amount of damage is 535(Won)× 50,150kg = 26,830,250Won.

This decision of Supreme Court is noteworthy because it recognized foreseeable income as well as actual income by allowing expected income,[52] which can ensure 'full compensation'.[53] It is therefore more beneficial to plaintiff.

In all these cases, the Supreme Court stated that

"The reparation for loss or damage caused to individuals as a result of breaches of competition law must be commensurate with the loss or damage sustained so as to ensure the effective protection of those rights."[54]

It is submitted that when assessing damages, the plaintiff must do more than simply state his estimate of lost profit. He must introduce evidence that offers a comparison of his actual revenues with the probable revenues when the infringer's

---

[52] Actual income means gross receipts minus ordinary and necessary expenses required to produce income.

[53] In respect to this decision, commentators support Supreme Court decision because it can ensure *full compensation*. Kim Young Kab, "Damages actions of Competition Act", 30(4) justice 66, 2003, p.82

[54] *Jung San Co.* Case- Supreme Court Case (1990.4.10) 89 DACA29075; *Sam Jin Co.* Case- Supreme court (1991.5.19)90DA17422; *Aloe* Case - Supreme Court (1997.4.22), 96DA54195

anticompetitive conduct is absent. Failure to offer an appropriate evidence of his damage may result in non-recovery for plaintiff.

Under Article 57 of the Competition Law, in case it is difficult to verify the amount of damages, the court may confirm the substantial amount of damages by virtue of its authority.[55]

The Competition Law 57 (Limitations on Claims for Damages and Related Matters) states that:

"When it is extremely difficult to prove any necessary facts to verify the damaged amount considering the characteristics of the fact, even though the occurrence of damage is admitted for infringement of the provision, the court shall admit the substantial amount of damage based on the result of evidentiary investigation and the intent of overall pleading."[56]

This provision seems very important in calculating damages. It is desirable to apply this provision in competition area especially in representative action because it is not easy to calculate the loss caused by anticompetitive conduct in this action.

3.2.2 The Current Situation in respect of the principle of compensation for damages in the EU

Articles 81 and 82 EC do not define the damage caused or the measure of damages for the purpose of an EC private competition law claim. Neither does Regulation 1/2003 answer all the questions on the remedies available to private parties.[57] It gives rise to the following question. Is it for the domestic legal systems to determine the assessment of compensation? The answer to this question would indicate the scope of the defendant's liability, and what a plaintiff would be entitled

---

[55] It is a reference to the Competition Act 57 which I set out in the following paragraph.
[56] Competition Law 57 (Limitations on Claims for Damages and Related Matters). It is an official translation by the Korea Fair Trade Commission.
[57] See Council Regulation 1/2003, [2003] O.J. L 1/ 1; See also, "Private antitrust enforcement of EC competition rules: recent developments", Competition Law Insight, 2004 p. 5.

to recover in a private competition damages claim.[58]

The ECJ has stressed that damages actions are important in enforcing the rights derived from Community law. Case law had already established that a Member State infringing EC law must pay compensation to private parties for damages caused because the Member State has failed to fulfil its Community obligations.[59] The ECJ judgment in *Courage v Crehan* stated in respect of competition law that:

"As regard the possibility of seeking compensation for loss caused by such a contract or by conduct liable to restrict or distort competition, the national courts, whose task is to apply the provisions of Community law in areas within their jurisdiction, must ensure that those rules take full effect and must protect the rights which they confer on individuals."[60]

In *Courage v Crehan*, the Court recognized compensatory damages should be payable to individuals harmed by breaches of the competition rules. The ECJ judgment in *Crehan* indicated that damages serve the purpose of compensation rather than punishment or deterrence. The ECJ stated that:

"...the practical effect of the prohibition laid down in Article 81(1) would be put at risk if it were not open to any individual to claim damages for loss caused to him by a contract or by conduct liable to restrict or distort competition."[61]

In respect to damage to be compensated, there are two important principles, effectiveness and equivalence, that must be observed. Where national courts are awarding damages, the principle of effectiveness requires that it may not be made impossible or excessively difficult for parties to exercise rights derived from EC law.[62] In a case on State liability, *Brasserie du Pecheur,*[63] the ECJ held that the

---

[58] Mihail Danov, "Awarding Exemplary (or Punitive) Antitrust Damages in EC Competition Cases with an International Element- The Rome II Regulation and the Commission's White Paper on Damages", 29(7)E, C.L.R.430, 2008.

[59] *Francovich*, Joined Cases C-6/90 & C-9/90, [1991] ECR I-5357; *Brasserie du Pêcheur*, Joined cases C-46/93 & C-48/93, [1996] ECR I-1029 ; *Courage v Crehan*, C-452/99, [2001]ECR I-6297.

[60] *Courage v Crehan*, C-452/99, [2001]ECR I-6297.

[61] *Courage v Crehan*, C-452/99, [2001]ECR I-6297 at para.2 ; J. Edelman and O. Odudu, "Compensatory Damages for Breaches of Article 81", 27 E.L. Rev. 327, 2002.

[62] *Rewe v. Landwirtschaftskammer*, C-33/76, [1976] ECR 1989, at para. 5

"reparation for loss or damage caused to individuals as a result of breaches of Community law must be commensurate with the loss or damage sustained so as to ensure the effective protection of those rights."[64] In *Crehan*, the ECJ has also reconfirmed the principle of effectiveness by stating that national rules granting only symbolic compensation to the aggrieved party are contrary to the *principle of effectiveness*[65] and should be disregarded.[66]

In *Manfredi,* the ECJ applied this rule to damages actions in competition cases and held that the plaintiff must be entitled to compensation not only for the actual loss but also for loss of profit, including interest. According to the Court, "it follows from the principle of effectiveness and the right of any individual to seek compensation for loss caused by a contract or by conduct liable to restrict or distort competition that injured persons must be able to seek compensation not only for actual loss (*damnum emergens*) but also for loss of profit (*lucrum cessans*) plus interest."[67]

In this case, the ECJ affirmed that an infringement of national law may also qualify as an infringement of Art.81, and that national courts are entitled to apply both.

The principle of equivalence requires that the remedies available to enforce EC law must be equivalent to those available to enforce comparable national law provisions.[68] The ECJ recalled that in *Manfredi* it:

In *Manfredi,* the ECJ stated that:

"In accordance with the principle of equivalence, it must be possible to award

---

[63] *Brasserie du Pêcheur v Bundesrepublik Deutschland and The Queen v. Secretary of State for Transport Ex p. Factortame*, Joined Cases C 46 & 48/93, [1996] ECR I-1029.
[64] Ibid.
[65] *Rewe v. Landwirtschaftskammer*, C-33/76, [1976] ECR 1989, at para. 5.; *Courage v Crehan*, C-452/99, [2001]ECR I-6297.
[66] *Sabine van Colson and Elisabeth Kamann v. Land Nordrhein-Westfalen* ,C- 14/83 ,[1984] ECR 1891
[67] *Manfredi v. LIoyd Adriatico Assicurazioni SpA*, C-295/04, [2006] ECJ, 348 para 95.
[68] See, for example, *Hans Just I/S v. Danish Ministry for Fiscal Affairs*, Case 68/79, [1980] ECR 501; *Amministrazione delle Finanze dello Stato v. SpA San Georgio*, Case 199/82, [1983]ECR 3595;[1985]2CMLR658; *Rewe v. Landwirtschaftskammer*, Case 33/76,[1976] ECR 1989 at para. 5.

particular damages, such as exemplary or punitive damages, pursuant to actions founded on the Community competition rules, if such damages may be awarded pursuant to similar actions founded on domestic law."[69]

In *Manfredi,*[70] the ECJ was making the same point about exemplary damages as it had in *Crehan*. In *Manfredi*, the Court reaffirmed principle of equivalence. It was saying that the principle of equivalence means that if these types of damages are available in similar cases in national law they must be available for breach of the Community rules.[71]

Given the principle of effectiveness, national courts are obliged to interpret national *procedural* rules in light of these principles of effectiveness and equivalence.

In its White Paper, the Commission stated that compensatory damages should be the minimum available and did not expressly advocate the use of restitutionary damages. The White Paper recognizes that in the absence of Community law on the matter, Member States are allowed to take steps to ensure that the protection of the right to claim damages for the loss caused by a competition law infringement if it does not entail the unjust enrichment of the victims.[72]

Therefore, according to the judgments in *Courage* v *Crehan,*[73] and *Manfredi*[74] and the White Paper, a domestic rule allowing exemplary damages may also be applied to actions under EC law.[75] It seems that, because of the principle of equivalence, victims of an EC competition law infringement are entitled to such as exemplary damages, to the extent such damages may be awarded pursuant to

---

[69] *Manfredi v. LIoyd Adriatico Assicurazioni SpA*, C-295/04,[2006] ECJ, 348 at para. 93.
[70] Ibid.
[71] Ibid., at para. 98. Although the judgment only refers to Article 81 EC because of the facts underlying the case, the reasoning of the Courts is such that it can also be applied to Article 82 cases.
[72] Commission Staff Working Paper accompanying the White Paper on Damages actions for breach of the EC antitrust rules, Com (2008) 165 final, 2008, p.58.
[73] *Courage v Crehan*, C-452/99, [2001]ECR I-6297
[74] *Manfredi v. LIoyd Adriatico Assicurazioni SpA*, C-295/04,[2006] ECJ, 348.
[75] *Brasserie du Pêcheur v. Bundesrepublik Deutschland and The Queen v. Secretary of State for Transport Ex p. Factortame*, Joined Cases C 46 & 48/93, [1996] ECR I-1029 para 90.

actions founded on the infringement of national competition law.[76] Provided that they are awarded in accordance with the general principles of Community law, exemplary damages founded on an infringement of EC competition rules are thus not excluded. It should also be noted that *Courage v Crehan* did not deal with the issue of restitution between the co-contractors (i.e. the recovery of what had passed between the co-contractors under the illegal contract).[77]

Most Member States provide for damages to be compensatory rather than punitive in nature. Hence there is no notion of multiple damages being awarded to successful plaintiffs as a matter of course in Europe. For example, in Germany, the introduction of double damages was discussed in the legislative process for the new German competition law as a means of deterring potential infringers, but was not ultimately enacted.[78]

The vast majority of Member States provides for damages to be compensatory and does not permit the recovery of exemplary damages. [79] The Commission's suggestion in the White Paper is that a minimum compensatory threshold should be set (i.e., to account for the actual loss, loss of profit, and interest), but that Member States should be free to go further and award punitive or other damages if their domestic legal systems provide for this.

However, it is not probable that the issue of exemplary (or punitive) damages

---

[76] Georg Berrisch, Eve Jordan and Rocio Salador Roldan, "EU Competition and Private actions for Damages", Northwestern Journal of International Law and Business, 2004 p.593; Commission Staff Working Paper accompanying the White Paper, supra note 72, p. 58.

[77] *Courage v Crehan* was an Article 234 reference and the referring court (the UK Court of Appeal) did not ask about restitutionary remedies. See Assimakis P Komninos, "EC Private Antitrust Enforcement: Decentralised Application of EC Competition Law by National Courts", Hart Publishing, 2008, 172; Alessandrao Di Giò, "Contract and Restitution Law and the Private Enforcement of EC Competition Law" (2009) 32 World Competition 199.

[78] Monopoly Commission, "Opinion on the draft of the revised competition law", 2004, p. 40.

[79] See section 3.2.3 which deals with the current situation in respect of the criteria and measurement of Damages in the UK. Ireland, and the Netherlands, however, their use is extremely circumscribed and only in extreme cases of abuse. See Ashurst Report. "Study on the Conditions for Damages in Case of Infringement of EC Competition Rules-Comparative Report", 2004, the Executive Summary of the study of the Commission, 2004; Jonathan Sinclair, "Damages in Private Antitrust Actions in Europe", 14 Loy. Consumer L. Rev. 551, 2002; Luke R. Tolaini and Anna M. Morfey, "Antitrust Damages Actions in Europe: A Step in the U.S. Direction?", 22-SUM Antitrust 93, 2008, p.96; Patricia Hanh Rosochowicz, "Deterrence and the relationship between public and private enforcement of competition law", Amsterdam Centre for Law and Economics Workshop, 2005, p.3.

is to be solved at EU level, as the matter was not touched upon by the Commission in the recently published White Paper on damages actions.[80] It is noteworthy, in spite of the fact that the Commission's White Paper makes references to *Manfredi*, which, as discussed above, confirms that exemplary (or punitive) damages may be available at national level, the paper does not deal explicitly with the issue.[81] It is in contrast to the US, where the Clayton Act authorizes private competition cases and provides for treble damages.[82]

According to the White Paper, "[v]ictims of an EC competition law infringement are entitled to full compensation of the harm caused." That means compensation for actual loss (damnum emergens) and for loss of profit (lucrum cessans) as a result of any reduction in sales and plus interest from the time the damage occurred until the capital sum awarded is actually paid.[83] However, the proposed damages are compensatory in nature, not punitive such as treble damages applicable in the US.[84] The White Paper also upholds the principle of not allowing unjust enrichment which is prohibited as a matter of Community law (the acquis communitaire as it is called) at present.[85] In the White Paper, the model outlined by the Commission is based on compensation through single damages for the harm suffered rather than multiple damages. This means compensation of the actual loss due to e.g. an anti-competitive price increase.

3.2.3 The Current Situation in respect of the principle of compensation for damages in the UK

In English law, the nature of the cause of damages actions for infringement of EC competition law is characterized as the tort of breach of statutory duty.[86] This

---

[80] European Commission, "White Paper on Damages Actions for Breach of the EC Antitrust Rules", COM(2008) 165 final.
[81] Ibid., section 2.5.
[82] 15 U.S.C. § 12
[83] Commission Staff Working Paper accompanying the White Paper, supra note 72, at 58; Sweet & Maxwell Limited and Contributors, "Commission Presents Paper on Compensating Victims of Competition Breaches", EU Focus 231, 2008, p.2.
[84] White Paper on Damages actions, supra note 80, section 2.5.
[85] Ibid. section 2.4 ; see also See Commission Staff Working Paper accompanying the White Paper, supra note 72, para 191 onwards.
[86] *Garden Cottage Foods Ltd v. Milk Marketing Board* [1984] 1 A.C. 130

stems from section 2(1) European Communities Act 1972 which provides a statutory basis for the recognition of directly effective EC law rights and duties in the English legal system. The principles of English law applicable to the tort of breach of statutory duty will, therefore, also apply to a claim for breaches of Article 81 and 82 provided that those rules do not conflict with the Community law principles that require national law not to discriminate between similar claims under national and EC law and not to prevent the availability of an effective remedy for breach of EC law.[87] The ECJ has held that an individual who has suffered loss as a result of breach of Article 81 or 82 by another undertaking or undertakings, must be able to recover damages in respect of that loss.[88] English law must supply the framework for such action.[89]

In the UK, infringement of the competition provisions is a tort for which the principal remedy is the award of damages.[90] In English tort law damages are normally assessed on the basis of injuries suffered by the plaintiff. Exemplary damages have been strictly controlled in *Rookes v Barnard.*[91] In this case, the House of Lord stated that:

"The general principle is that damages should compensate the plaintiff and not punish the defendant..... Exemplary damages may be awarded for particular torts but it is entirely permissive and never mandatory."

It also stated that:

"Exemplary damages are essentially different from ordinary, damages. The object of damages in the usual sense of the term is to compensate. The objective of exemplary damages is to punish and deter. It may well be thought that this confuses the civil and criminal functions of the law."[92]

---

[87] "Executive summary and overview of the UK national report", 2006, p.1. This report was made to respond to Ashurst Report 2004. See also Ashurst Report, supra note 79.
[88] *Courage Ltd v Crehan,* C-453/99, [2001] ECR I-6297.
[89] Ibid. See also Alison Jones and Brenda Sufrin, "EC Competition Law", 3rd ed., Oxford, 2007, p.1338.
[90] *Crehan v. Interpreneur* [2004] EWCA Civ 637
[91] See *Rookes v. Barnard* [1964] A.C. 1129 at 1159.
[92] Ibid., at 1221.

It set out three categories in which exemplary damages were available at the jury's or judges' discretion.[93] The three categories were confirmed by the House of Lords in *Cassell v Broome.*[94] The three categories in which exemplary damages[95] have been allowed pursue *deterrence* and the *public interest.*[96] The first is in the case of conduct calculated to make a profit which may well exceed the compensation payable to the plaintiff. The second category is cases of oppressive, arbitrary or unconstitutional conduct by government servants. The third is express authorization by statute.[97]

However, it can be argued that gain-based damages are *alternative remedies* to loss-based damages for civil damages action.[98] Lord Blackburn in *Livingstonev Raywards Coal Co* stated that:

"When awarding damages the law does not adhere slavishly to the concept of compensation for financially measurable loss. When the circumstances require, damages are measured by reference to the benefit obtained by the wrongdoer".[99]

The House of Lords in *Kuddus* were not enthusiastic about exemplary damages. In *Kuddus*, the plaintiffs argued that exemplary damages should be available.[100] In this case, however, of the five Law Lords, Lord Nicholls was not keen on exemplary damages, three did not express concluded opinions but were not in favour of the possibility of making such awards and Lord Scott considered exemplary damages to be illegitimate and contrary to the fundamental principle of damages awards.[101]

---

[93] Ibid., at 1226.
[94] See *Broome v Cassell and Co* [1972] A.C. 1027.
[95] Exemplary and punitive are in effect, the same thing. Thus, in this thesis, I use exemplary damages instead of punitive damages.
[96] See *Broome v Cassell and Co* [1972] A.C. 1027. It could be also allowed where exemplary damages are expressly provided by statute. For instance, see the Copyright, Designs and Patents Act 1988; See *Williams v Settle* [1960] 1 W.L.R. 1072.
[97] See e.g. Copyright Designs and Patent Act
[98] Stephen Watterson, "An Account of Profits or Damages? The History of Orthodoxy", Oxford Journal of Legal Studies, 2004, p.471. In this article, Watterson argued that the money remedies available for civil wrongdoing are not limited to compensatory damages.
[99] Lord Blackburn in *Livingstone v Rawyards Coal Co* (1879-80) L.R. 5 App.Cas. 25 at 39.
[100] *Kuddus v Chief Constable of Leicestershire Constabulary* [2001]UKHL29;[2001] 2 W.L.R. 1789. Where the 'cause of action test' previously limited the use of exemplary damages to claims based on a cause of action for which such damages were already an established remedy.
[101] *Kuddus v Chief Constable of Leicestershire Constabulary* [2001]UKHL29;[2001] 2 W.L.R. 1789, HL.

In *BCL Old Co Ltd v Aventis*, the CAT stated that it would need to consider whether the claims before it should be assessed on the basis of the question 'what has been lost due to breach?' or the question 'what has been unjustly gained by defendant?' and suggested that section 47A of the Competition Act 1998(which creates the right of third parties to bring follow-on actions) may cover both possibilities.[102]

As explained in section 3.2. above tort damages are different from restitutionary damages since restitutionary damages is gain-based whereas tort damages is loss- based compensation.[103] In *Wass*, there were two general rules governing the provision of relief in tort, expressed in the following terms:

"The general rule is that a successful plaintiff in an action in tort recovers damage equivalent to the loss which he has suffered, no more and no less. If he has suffered no loss, the most he can recover are nominal damages. A second general rule is that where the plaintiff has suffered loss to his property or some proprietary right, he recovers damages equivalent to the diminution in value of the property or right." [104]

In respect to restitutionary damages in competition area, the leading case is now *Devenish Nutrition v Sanofi-Aventis*.[105] This case is about the measure of damages in cartel cases. The case represents the latest claim in a series of private competition law actions based upon the EC Commission Decision of November 21, 2001[106] related to vitamins cartels which operated in the animal feed industry throughout the 1990s.[107] In 2001, the European Commission found that certain vitamin manufacturers, including the respondents, had participated in eight cartels

---

[102] *BCL Old Co Limited and others v. Aventis SA and. Others*, Case No 1028/5/7/04, [2005]CAT 2.
[103] Peter Cane, "The Anatomy of Tort Law", Oxford: Hart Publishing, 1997, p.11-13.
[104] *Stoke-on-Trent City Council v W & J Wass Ltd* and *Halifax Building Society v Thomas* [1988] 1 W.L.R. 1406 at 1410.
[105] *Devenish Nutrition Limited v. Sanofi-Aventis SA(France) and others*, Case A3/2008/0080, [2008]EWCA Civ 1086; See also, *Devenish Nutrition Ltd v Sanofi-Aventis SA* [2007] EWHC 2394 (Ch).
[106] Decision relating to a proceeding pursuant to Article 81 of the EC Treaty and Article 53 of the EEA Agreement (COMP/E-1/37.512-Vitamins) [2003] OJ L6/1.
[107] During the 1990s, members of the three defendant groups of companies participated, with a number of other vitamin manufacturers, in the cartels. In its case, the Commission found the defendants to be in breach of Art.81 and delivered swingeing fines, intended to reflect the gravity and duration of the offences and also to represent a deterrent.

relating to the supply of various vitamin products and imposed fines totalling 855.22 million. During the operation of the cartel, Devenish Nutrition Ltd ("Devenish") was a purchaser of vitamins, which it mixed with other ingredients to make animal feedstuffs and it then sold them to customers. Devenish brought an action against certain companies within the Hoffman la Roche, BASF and Aventis groups, alleging damages for the tort of breach of statutory duty based upon the infringement of Article81 EC. Devenish was therefore a follow on action brought after the Commission's public enforcement. Claiming in tort for breach of statutory duty and relying on the Decision as legal proof of an infringement of Community competition law, the plaintiffs sought compensatory damages, exemplary damages, restitutionary damages and an account of profits.[108] The case raised preliminary legal issues relating to the availability of a range of remedies beyond the normal compensatory measure of tortious damages.

In 2007, the High Court ruled that neither restitutionary nor exemplary damages would be available to the plaintiffs.[109] On October 14, 2008, the Court of Appeal delivered its judgment on the appeal from the High Court. It upheld the judge's rejection of Devenish's claim for restitutionary damages.[110] The Court of Appeal held that a restitutionary award was not available in this case and noted that even in cases where a restitutionary award is available, it is generally awarded where an award of compensatory damages would be inadequate to compensate the plaintiff for the infringement of competition law.[111]

The Court of Appeal upheld the judgment of Lewinson J in the High Court by stating that:

"A restitutionary award is not an available remedy in an antitrust case. Moreover, even where a restitutionary award is an available, it is generally awarded where an award of more traditionally based compensatory damages would be

---

[108] See section 3.2 which deals with the current situation in respect of the criteria and measurement of damages in the EU, UK, US and Korea.
[109] *Devenish v Sanofi-Aventis SA* (France) and others, [2007] EWHC 2394 (Ch).
[110] *Devenish v Sanofi-Aventis SA* (France) and others, [2008] EWCA Civ 1086, affirming [2007] EWHC 2394 (Ch).
[111] Ibid. para. 108.

inadequate to compensate the plaintiff for the invasion of his rights. Yet in the present case, Dr Veljanovski[112] says that the measure of restitutionary damages is the same as the measure of compensatory damages. If that is so, then on the assumed facts compensatory damages would be an adequate remedy. Therefore, a restitutionary award is not available in the present case."[113]

According to the Court of Appeal in *Devenish*, therefore, under English law, damages are generally awarded on a compensatory basis.[114] The determination that exemplary damages, restitutionary damages and an account of profits should not be awarded by the English courts in claims for breaches of Community competition law, at least when the infringer has already been fined, has far-reaching implications for future private enforcement actions in England and Wales. The purpose of the Commission's fine included both punishment and deterrence and that an award to punish or deter the defendants further could compromise the Community law principle of double jeopardy or non bis in idem.[115]

While the ECJ in *Manfredi* has held that, in principle, an award of exemplary damages is not precluded by European law, *Devenish* clarifies that following the public enforcement of competition laws and the imposition of a fine, whether commuted or not, only compensatory damages can be awarded by an English court.[116] In *Devenish*, the Court of Appeal recognized that in the absence of Community rules governing the matter, it is for the Member State courts to decide on the appropriate measure of damages, provided that the principles of effectiveness and equivalence are respected. It decided, in the light of that, that in English law compensatory damages are the normal measure.

The Court of Appeal said that these principles merely require that national remedies should be sufficient and no less favourable than actions based on domestic

---

[112] Dr Veljanovski was the expert witness in *Devenish* case.
[113] *Devenish v Sanofi-Aventis*, [2008] EWCA Civ 1086 at para. 16.
[114] *Devenish v Sanofi-Aventis*, [2008] EWCA Civ 1086 at para. 2 (Arden LJ); Greg Olsen, "Actions for damages are Compensation and Deterrence? The passing on defence and the future direction of UK private proceedings", Competition Law Insight 4.8(3), 2005 , p. 3.
[115] Non bis in idem is the principle that a person should not be 'sanctioned more than once for the same unlawful conduct to protect one and the same legal interest". See *Archer Daniels Midland Co v Commission of the European Communities*[2006] 5 CMLR28.
[116] *Devenish v Sanofi-Aventis*, [2008] EWCA Civ 1086 at para. 16.

legislation, conditions which are fulfilled by compensatory damages. The award of compensatory damages in this case fulfilled these conditions..[117]

In 2007 the OFT conducted an informal consultation on how to make redress for consumers and business for breaches of competition law more effective and published a discussion paper. In its discussion paper, the OFT contemplated that in some cases there could be a restitutionary award which is different from exemplary damage since exemplary damages bear no relation to the loss by the victim or the gain by the infringer. The OFT stated that:

"In terms of the type of damages that may be recoverable, it is well established that private actions involve claims for damages that are compensatory in nature. In certain circumstances, the courts may award restitutionary damages, which aim to strip away some or all of the gains made by a defendant which arise from a civil wrong. Furthermore, exemplary damages might be available in certain circumstances in England and Wales. Other forms of relief, such as the equitable remedy of accounting for profits, may also need to be considered in some cases. It will be for the courts to determine how the general principles for determining loss or damage in various types of case apply to actions for infringement of competition law."[118]

A significant infringement relevant for exemplary damage could be bid rigging against the state and public authorities. There is evidence drawn from the Netherlands[119] and the UK[120] that bid rigging against the state is a pervasive form of serious anticompetitive activity. It is submitted that the abuse of a dominant position could be also relevant for exemplary damage in competition area.

---

[117] *Devenish v Sanofi-Aventis*, [2008] EWCA Civ 1086 at para. 18.
[118] The Office of Fair Trading, "Private Actions in Competition Law: Effective Redress for Consumes and Business", OFT916, 2007, at section 2.11.
[119] Doree, "Collusion in the Dutch Construction Industry", Routledge, 2005.
[120] Third OFT Press Release on Roof Contractor Bid Rigging (2006). See: www.oft.gov.uk/News/ Press+ releases/ 2006/ 34-06.htm

3.2.4 The Current Situation in respect of the principle of compensation for damages in the US

Currently, the US is the only jurisdiction which has mandatory multiple damages of any kind such as treble damages. It is the outstanding feature of US law. In respect to treble damages, there are two things to be considered. Firstly, what are the multiple damages? Secondly, what is the rationale for making the treble damages?

3.2.4.1 Overview of Multiple and Treble Damages?

Multiple damage remedies allow the plaintiff to recover multiple times the amount of damage actually suffered as a result of the anticompetitive conduct. Where an infringement of the competition laws is found, this damage could be automatically, selectively or discretionally trebled.

Treble damage remedies allow the plaintiff to recover three times the amount of damage actually suffered as a result of the anticompetitive conduct.[121] Where an infringement of the antitrust laws is found, damages are *automatically* trebled. The courts do not have discretion to limit recovery to single damages, regardless of the nature of the infringement.[122]

In the US the treble damages remedy has been described as "the cornerstone of private antitrust enforcement."[123] However, treble damages are not an innovation of the American legislator. Its roots can be traced back to the UK's *Statute of Monopolies of 1623*[124] because in this statute, multiple damages were

---

[121] See the free dictionary by farlex at http://legal-dictionary.thefreedictionary.com/treble+damage.

[122] With respect to difference between punitive damage and treble damage, See generally, Geraldine Alexis, Andrea Deshazo, "Punitive Damages: Is Bifurcation Right for Your Case?", Antitrust, 2002.

[123] Edward D. Cavanagh, "Antitrust Remedies Revisited", 84 Oregon Law Review 147, 2005, p.222; Hannah L. Buxbaum, "Private Enforcement of Competition Law in the Untied States- of Optimal Deterrence and Social Costs", in "Private Enforcement of EC Competition Law", Kluwer Law, ed. by Jürgen Basedow, 2007, p. 43.

[124] England's Statute of Monopolies of 1623(21 Jac. 1,c.3), while generally condemning monopolies, provided the true and first inventor of a given item up to fourteen years of exclusive rights to their invention, provided that : "they be not contrary to the law nor mischievous to the state by raising prices of commodities at home, or hurt of trade, or generally inconvenient." In the UK, the Patents Act 1977 harmonized UK Patent law, which was no longer based on the Statute of Monopolies; Clifford A. Jones, "Exporting Antitrust Courtrooms to the World: Private Enforcement in a Global Market", Loyola

recognized first time. The original version of Senator Sherman's bill allowed plaintiffs to recover only *double* damages for any harm suffered as a result of antitrust infringements.[125] Awarding *treble* damages instead was intended by Congress in 1890 to encourage private enforcement of antitrust laws for which no appropriate public enforcement had been provided.[126] It is argued that fear of non-enforcement or minimal enforcement by public enforcers was an appropriate political concern back then because there were no effective public antitrust enforcers. Treble damages also reflected the view that antitrust litigation was as a major and uncertain undertaking for the plaintiff.[127] The Judiciary Committee of Congress, in response to concerns that double damages would not sufficiently encourage private plaintiffs stipulated treble damages.[128]

However, strengthening the Sherman Act was part of the programme put forward by the campaign of Woodrow Wilson in 1912 and led to Clayton Act in 1914. At the federal level in the US, the scope of recovery by private plaintiffs is prescribed by Section 4(a) of the Clayton Act superseding the relevant provisions of Sherman Act. The Clayton Act contains all relevant provisions for private enforcement and provides that:

"Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefore ... and shall recover threefold the damage by him sustained, and the cost of suit, including a reasonable attorney's fee." [129]

Consumer Law Review, 2004, p. 410.

[125] See Kintner, "The Legislative History of the Federal Antitrust Laws and Related Statues", 1978; Caranagh, "Deterrence Antitrust Damages-An Idea Whose Time Has Come?", 61 Tul. L.Rev777,1987, p. 782-83.

[126] Donald I. Baker, supra note 14, p. 379.

[127] Much of the debate concerning the private right of action has focused on its authorization of treble damages. See, e.g., Roger D. Blair and William H. Page, "Speculative" Antitrust Damages, 70 Wash. L. Rev. 423, 1995; Herbert Hovenkamp, "Treble Damages Reform", 33 Antitrust Bull. 233, 1988; Robert H. Lande, "Are Antitrust Treble Damages Really Single Damages?", 54 Ohio St. L.J. 115, 1993; W. M. Landes, "Optimal Sanctions for Antitrust Violations", 50 U. Chi. L. Rev. 652,1983. For more comprehensive studies of the treble damage remedy, see ABA Section of Antitrust Law, Monograph No. 13, "Treble-Damages Remedy", 1986; William Breit and Kenneth G. Elzinga, "Antitrust Penalty Reform: An Economic Analysis", American Enterprise Institute for Public Policy Research, 1986; "Private Antitrust Litigation: New Evidence, New Learning", edited by Lawrence J. White, 1988.

[128] Act of July 2, 1890, § 7, ch. 647, 26 Stat. 210, superseded by the Clayton Act, § 4, 38 Stat. 731 (1914) (now codified as 15 U.S.C. § 15), and ultimately repealed by 69 Stat. 283, 1955.

[129] 15 U.S.C. §15(a) Act of 26 September 1914, Ch. 311, 38 Stat. 717 (1914), current version p. 15 U.S.C.

3.2.4.2 Rationale for Treble Damages

US antitrust law was framed for private enforcement to assist public enforcement in attaining an optimal enforcement. The primary rationale of treble damages is to ensure optimal enforcement through efficient private enforcement.[130] To encourage private enforcement, Congress made a private right of action for individuals or entities harmed by antitrust acts very attractive because it considered that single damages are not enough to encourage antitrust actions.[131]

As the Antitrust Modernization Commission noted: "Indeed, in light of the fact that some damages may not be recoverable (e.g., compensation for interest prior to judgment, or because of the statute of limitations and the inability to recover 'speculative' damages) treble damages help ensure that victims will receive at least their actual damages."[132]

To the extent the purpose of the remedy is compensation, the damages caused by an antitrust violation should consist of the sum of all relatively predictable harms caused by that violation affecting anyone other than the defendants. Damages should include the wealth transferred from consumers to the violator(s), as well as the allocative inefficiency effects felt by society, whether caused directly, or indirectly. Plaintiffs' lawyer's fees, the value of plaintiffs' time spent pursuing the case, and the cost to the American taxpayer of administering the judicial system should also be included.

It is submitted that to achieve an optimal enforcement through private enforcement, the treble damages provisions created a powerful weapon to punish anticompetitive conduct.

---

§§ 41-58 (1996).

[130] See generally, Edward D. Cavanagh, "Detrebling Antitrust Damages: An Idea Whose Time Has Come?", 61 Tul. L. Rev.777, 1987, p. 786-788.

[131] See generally, John D. Guilfoil, "Damages Determination in Private Antitrust Suits", Notre Dame L., 1966-1967; see also generally, John M. Desiderio, "Private Treble Damage Antitrust Actions: An Outline of Fundamental Priciples", 48 Brook, L. Rev. 409, 1982; In respect to the necessity of treble damages, see below footnote 159 for detail.

[132] Antitrust Modernization Commission, "2007 Report and Recommendations", p. 264. available at http://govinfo.library.unt.edu/ amc/report_ recommendation/amc_final_report.pdf.

I discuss in the following sections four aspects of the rationale of treble damages: compensation, deterrence, punishment and disgorgement of illegal gain.

3.3.4.2.1 Compensation

The treble damage remedy was intended to serve compensatory purposes.[133] Treble damages could be a means of full compensation[134] for losses sustained by anticompetitive infringements.[135] Treble damages are based on the idea that it can raise the incentive for private parties to start damages actions and thereby strongly influence on bringing legal action. It was thought that awarding treble damages to private enforcers could create a significant incentive for a plaintiff to undertake the complex, lengthy, and expensive task of uncovering and prosecuting antitrust infringements[136] because there is a high possibility that plaintiffs could get compensation three times as their actual damage.[137] Without treble damages, plaintiffs are less likely to undertake an arduous competition action even if the expected compensation is greater than the expected cost of litigating the case.[138]

3.3.4.2.2 Deterring Future Infringements

The treble damages remedy serves not only the purpose of compensating the victims of antitrust law infringements but also generate a strong deterrent effect on

---

[133] Patricia Hanh Rosochowicz, supra note 79, p.5.
[134] In respect to the difference between full compensation and over compensation, see section 3.2 which deals with full compensation and over compensation.
[135] Robert H. Lande and Joshua P. Davis, "Benefits from private antitrust enforcement : an analysis of forty cases", University of San Francisco Law Review Vol.42, 2008, p.882; Edward D. Cavanagh, "Statement of Edward D. Cavanagh before the Antitrust Modernization Commission, 2005 p. 3.; See Robert H.Lande, supra note 127, pp.122-124, 158-168
[136] S. C. Salop and L. J. White, "Private Antitrust Litigation: An Introduction and Framework", in 「Private Antitrust Litigation」, 1988, pp.1019-1020; Robert McNary, "Optimal Deterrence with Public and Private Antitrust Enforcement", University of Chicago Law school, Law and Economics Workshop, 2006, p.10.
[137] S. C. Salop and L. J. White, "Economic Analysis of Private Antitrust Litigation", 74 Geo. L.J 1001, 1986, p. 1037; W. M. Landes, supra note 126, p 675.
[138] Posner, "Antitrust Law: An Economic Perspective", Chicago, 1976, p. 228.; P. Friedman, D. Gelfand and C. Nordlander, etc., "Comments of the Section of Antitrust Law and the Section of International Law of the American Bar Association in Response to the Request for Public Comment of the Commission of the European Communities On Damage Actions for Breaches of EU Antitrust Rules", ABA, April 2006, p.27.

potential future perpetrators because treble damages can heighten the probability of detection of the infringement of competition law.[139] From a deterrence perspective, treble damage is necessary because some violations of antitrust laws go undetected.[140] It has been pointed out that because of their typically covert nature, antitrust violations such as cartels are often difficult to detect and very expensive to prosecute.[141] Trebling, however, creates a powerful incentive for private parties to investigate, detect and prosecute antitrust violations.[142] Supporters of the treble damages mechanism argue that if antitrust recoveries were limited to actual damages, private parties would have little motivation to sue, given the unpredictability and high costs of antitrust litigation. Nor would actual damages provide sufficient compensation at all cases. [143]

In the US, private enforcement has been considered as a deterrent mechanism as well as compensatory one, as the US treble damages indicate.[144] In enacting the antitrust laws, Congress recognized that mandatory trebling would increase prosecution of antitrust violators and enhance the overall goals of antitrust

---

[139] Hannah L. Buxbaum, "Private Enforcement of Competition Law in the Untied States- of Optimal Deterrence and Social Costs", in "Private Enforcement of EC Competition Law", Kluwer Law, ed. by Jürgen Basedow, 2007, p. 45.; Patricia Hanh Rosochowicz, "Deterrence and the relationship between public and private enforcement of competition law", Amsterdam Centre for Law and Economics Workshop, 2005, p.5-6; Edward D. Cavanagh, "Statement of Edward D. Cavanagh before the Antitrust Modernization Commission, 2005, pp. 4 -6; Franklin M. Fisher, "Economic Analysis and Antitrust Damages", World Competition, 2006, p. 391; *Am. Soc'y of Mech. Eng'rs v. Hydrolevel Corp.*, 456 U.S. 556 (1982); Edward D. Cavanagh , "Detrebling Antitrust Damages : An Idear Whose Time Has Come?", 61 Tulane Law Review 777, 1987 p. 801-809; see also *Blue Shield of Va. v. McCready*, 457 U.S. 465, 470 (1982); see also generally, John M. Desiderio, "Private Treble Damage Antitrust Actions: An Outline of Fundamental Principles", 48 Brooklyn Law Review 409, 1982; Corinne Bergen, "Generating Extra Wind in the Sails of the EU Antitrust Enforcement Boat", Journal of International Business and Law, 2006, p. 220-221; Robert H. Lande and Joshua P. Davis, "Benefits from Private Antitrust Enforcement : An Analysis of Forty Cases", University of San Francisco Law Review, 2008, p.882; Tim Reher, "The Commission's White Paper on Damages Actions for Breach of the EC Antitrust Rules", The European Antitrust Review, 2009, p.1; P. Friedman, D. Gelfand et al., Ibid., p.19;

[140] Frank H. Easterbrook, "Detrebling Antitrust Damages", 28 J.L.Econ. 445, 1985, p.454.

[141] Edward D. Cavanagh, "Detrebling Antitrust Damages in Monopolization Cases", 76 Antitrust L.J. 97, 2009, p.101.

[142] Frank H. Easterbrook, supra note 140, p.451.

[143] Edward D. Cavanagh, supra note 139, p.101.

[144] P. Friedman, D. Gelfand et al., supra note 138, p. 65; *Cooper Industries v. Leatherman Tool Grp.*, 532 U.S. 424 (2001) ; see also Gertz, 418 U.S. at 350 (noting that punitive damages "are not compensation for injury... [but] are private fines levied by civil juries to punish reprehensible conduct and to deter its future occurrence"); W. Page Keeton et al., "Law of Torts"(5th ed.), 1984,, § 2, p. 9 (explaining that punitive damages are awarded to punish the defendant, to teach the defendant not to "do it again," and to deter others from similar behavior); W. Kip Viscusi, Why There Is No Defense of Punitive Damages, 87 Geo. L.J. 381, 381, 1998), p. 383.

enforcement.[145] Treble damages will influence the incentive of potential plaintiffs to bring actions.[146]

The important question is whether mandatory trebling provides the appropriate level of deterrence. A multiple is necessary to force the violator to equate liability with damages caused. The function of treble damages is punishment as well as compensation, it is necessary to consider what kind of damage could be suitable for exemplary damage in competition cases. It is submitted that treble damages can be awarded for the typical and blatant competition law infringements, such as price-fixing cartel. Multiplication is essential to create optimal incentives for would-be infringers when unlawful acts are not certain to be detected and prosecuted successfully.[147] From an economic perspective, the appropriate deterrent level turns on the likelihood that objectionable conduct will be detected and penalized.[148] It is argued that a multiplier is desirable if the probability of detecting and penalizing the offence is less than one hundred percent.[149] If the likelihood of being caught is one in two, then double damages provide the appropriate deterrent.[150] If the chances of successful prosecution are one in ten, then damages amounting to ten times the actual damages would be optimal. Multiple damages may therefore counteract the low-probability of detection and prosecution and ensure appropriate level of enforcement.[151] If this is correct, the US mandatory trebling would be optimal when the chances of detection are one in three.

Multiple damages are most relevant for practices that are concealable and clandestine, such as horizontal-price-fixing cartels because covert behavior is difficult to detect.[152] Furthermore, there is no probable justification of cartels since such infringements damage to competition as well as their victims i.e. they cannot

---

[145] Antitrust Modernization Commission, supra note 132, pp. 246-247.
[146] Edward D. Cavanagh, supra note 141, p.102.
[147] See section 1.4.3 which deals with way to achieve optimal enforcement of competition law.
[148] Frank H. Easterbrook, supra note 140, p.454-458.
[149] See W. P.J. Wils, "The Optimal Enforcement of EC Antitrust Law", Kluwer Law International, 2002, p. 24-26; Posner, "Antirust law-An Economic Perspective", Chicago, 1976, p. 226-27.
[150] Frank H. Easterbrook, "Detrebling Antitrust Damages", 28 J.L. & Econ. 1985, p. 455.
[151] Ibid.
[152] Donald I. Baker, supra note 14, p.384; see Frank H. Easterbrook, supra note 140, pp. 445, 450.

be justified by efficiency arguments.[153] Thus, it can be argued that the appropriate level of enforcement for most antitrust conduct such as in horizontal price-fixing cases may be double or even treble damage to set damages multiples because without strong incentive such as treble damages, potential plaintiffs are not likely to bring actions before the courts.[154]

3.2.4.2.3 Punishment for Anticompetitive conducts

Punishment can be described as occurring whenever a defendant is ordered to pay an amount in excess of actual damages suffered by the plaintiff. The award of actual damages only may fail to punish infringers for the total harm caused by the infringers. For instance, the infringer in a price-fixing cartel could be insufficiently punished for the harm caused by its illegal conduct when compensation for damages is limited to the amount of actual damage caused by infringers. The overcharges which are transfers of consumer surplus from buyers to conspiring sellers are only part of the damage inflicted by the illegal conduct for the following reasons. Firstly, compensation for the overcharging caused by price-fixing cartel does not include lost opportunity costs.[155] Secondly, it does not include the victim's share of the deadweight loss to society resulting from horizontal conspiracies, although cartels can create an inefficient allocation of resources, thereby causing a net loss to society as a whole, the so-called deadweight loss to society.[156] It has been shown that the loss in allocative efficiency attributable to cartelization varies from case to case, depending on the nature of the restraint, the industry involved, and scope of the conspiracy.[157]

Trebling can play a role in antitrust proceedings similar to the role of exemplary damages since actual damages cannot play the role of punishment whereas mandatory treble damages can serve to punish antitrust infringers if treble

---

[153] Connor and Boltova, "Cartel Overcharges: Survey and Meta-Analysis", Purdue University, 2005 p. 22.
[154] In respect to the appropriate level of deterrence for most antitrust conduct, see section 1.4.2 which deals with under-enforcement and over- enforcement of competition law; Frank H. Easterbrook, supra note 140, p. 455; Edward Cavanagh, supra note 123, p. 171.
[155] Opportunity costs might be relevant in an over-charging situation in which purchasers could not buy the affected product or service because the price was too high as a result of the overcharge.
[156] Edward Cavanagh, supra note 123, p. 173.
[157] E. D. Cavanagh's Statement before the AMC,supra note 135, p. 4.

damages are more than the actual loss.[158] In the US the availability of treble damages means that additional 'exemplary' damages are not available in competition actions.[159]

3.2.4.2.4 Disgorgement of Illegal Gains

Treble damages can take illegal gains away from the infringers and restore these profits to the victims. In theory, trebling is not necessary to assure disgorgement of ill-gotten gains because as already mentioned, plaintiffs' actual losses would correspond to defendants' actual illegal gains.[160] Without the incentive of multiple damages, however, potential plaintiffs may not bring damages actions before courts, as is discussed above.

Antitrust infringers may therefore not be faced with damages action and may well be able to reap the benefits of their illegal conduct. Therefore, it has been suggested that antitrust damage awards must exceed the actual damage caused by the infringer in order to encourage the plaintiff to bring damages actions.[161]

3.2.4.3 The Problems of Mandatory Treble Damages and the Desirability of introducing them in other Jurisdictions

As indicated above, treble damages can contribute to optimal enforcement in cartel cases because practices such as price-fixing and market-allocation are clandestine and anticompetitive. It has been argued, therefore, that treble damages can impose the *right amount of enforcement through civil damages.*[162] However, treble damages actions are deeply problematic.

---

[158] See Note "Private Treble Damage Antitrust Suits: Measure of Damages for Destruction of All or Part of a Business", 80 Harvard Law Review, 1967, p. 1566

[159] Round Table Discussion on "Private Remedies: Passing on Defence; Indirect Purchaser Standing; Definition of Damages: United States", Working Party No.3 on Co-operation and Enforcement, DAF/COMP/WP3/WD (2006), p.12.

[160] See section 3.2 which deals with the current situation in respect of the criteria and measurement of damages in the EU, UK, US and Korea; E. D. Cavanagh's Statement before the AMC, supra note 135, p. 6.

[161] Robert H. Lande, supra note 127, p. 171.

[162] Donald I. Baker, supra note 14, p. 382.

As already noted, the US is at present the only country in the world which has a treble damages regime. It is therefore necessary to discuss the operation of this regime and the problems it presents in order to assess whether the adoption of such a mandatory multiplying system would be desirable in other jurisdictions, in particular for the purposes of the thesis, in Korea.

We should recognize at the outset that the automatic trebling of damages under US antitrust law has been the source of extensive disagreement and a wide debate.[163] The problems of treble damages were not a major issue prior to the 1960s because until then there were simply very few successful private antitrust actions.[164] In 1960, there was substantial change to the rules on class actions, such as certification of class actions.[165] This change made it easier for private parties to bring treble damages actions than it had been before 1960.[166] Therefore, treble damages matters very much today because of the great increase in private actions and the problems are therefore more acute.[167] Furthermore, where other jurisdictions, such as Korea are concerned the rationale for treble damages in the US may not apply because of the different features of those systems.

The following section discusses five major issues in the debate about treble damages.

3.2.4.3.1 Prevention of Unjust Enrichment

Unjust enrichment is a legal term denoting a particular type of causative

---

[163] See generally, Kent Roach, Michael J. Trebilcock, " Private Enforcement of Competition Law", Policy Options, 1997, p. 14-15; See generally, Andrew Amer, "United States Supreme Court Strengthens Standards Enforcing Due Process Limitations on Punitive Damage Awards", Simpson Thacher & Bartlett LLP, 2003; Michael P. Foradas, "Private Enforcement of the Antitrust Laws", Practicing Law Institute, 1988, p.242-244; See generally, W.Breit and K. Elzing, "The Antitrust Realties: A Study in Law and Economics", 1976.

[164] See section 2.4.3.2 which deals with the number of private actions in the US; see also Milton Handler, "Trade Regulation",1997, p.106; Charles A. Sullivan, "Breaking Up the Treble Play: Attacks on the Private Treble Damage Antitrust Action", 14 Seton Hall L. Rev.17, 1983, p.18-21.

[165] Congress made certification of class actions less strict in 1960. See section 6.4.5 which deals with overview of class actions in the US.

[166] William H. Page, "Policy Choices in Defining the Measure of Antitrust Damages", DAF/COMP/WP3, 2006, p. 3.

[167] See section 2.4 which deals with the overview of private antitrust enforcement in the US.

event in which one party is unjustly enriched at the expense of another.[168] Unjust enrichment involves disgorging the wrongdoer's gain. The doctrine of unjust enrichment is created to prevent the injustice that occurs where one person receives money or other property at the expense of another person. A claim based on unjust enrichment results in an obligation to make compensation. In an extreme case it can produce an award of money when the victim has lost nothing. If a person receives money or other property at the expense of another, he should return the property or money to the right owner. At a general level, there are three requirements that have to be met before a claim for unjust enrichment can be put forward. Firstly, there has to be some enrichment of the defendant. Secondly, enrichment needs to be unjustified. Thirdly, enrichment needs to correspond to deprivation of the plaintiff.[169]

In respect to unjust enrichment, there are two established approaches. Traditionally, common law systems such as those of England and the US have proceeded on the basis of what may be termed the 'unjust factor' approach which requires the plaintiff to point to one of a number of factors recognized by the law as rendering the defendant's enrichment unjust. Traditionally, civil law systems such as those of France and Germany have proceeded on the basis of what may be termed the 'absence of basis' approach which seeks to identify enrichments with no legitimate explanatory basis.[170] Korea, which also has a civil law system, has likewise proceeded on the basis of unjust enrichment in the 'absence of basis' approach.[171]

It can be argued that except in cartel cases, treble damages can result in a windfall to plaintiffs because treble damages are not related to actual loss.[172] Under

---

[168] Kwac Yun-Gik, supra note 7, p.420; Kim Hyung-Bae, "Lecture on Civil Law"(5th ed.), Shinjosa, 2006, p. 1321

[169] Jan M. Smits, "A European Law on Unjustified Enrichment? A Critical View of the Law of Restitution in the Draft Common Frame of Reference", in 「European Private Law Beyond the Common Frame of Reference」 (ed. by Antoni Vaquer), 2008, p.3-4.

[170] Kwac Yun-Gik, supra note 7, p.433

[171] Kwac Yun-Gik, Ibid. ; Kim Hyung-Bae, supra note 168, p. 1327; Gi Won-Lim, supra note 27, p.1359 : Song Deok-Soo, supra note 27, p.1480

[172] Windfall to plaintiffs may be exacerbated in the US where treble recovery would be more than three fold recoveries because antitrust treble damage actions from many different states have been brought for the same illegal behaviour of same defendant. However, the matter of multiple actions in different US states is a problem unique to the US. In respect to problems caused by multiple actions, see section

this circumstance, multiple damages would be *unjust enrichment* for plaintiff because it could be a windfall to plaintiff.[173] On this argument treble damages would, in themselves, be *anticompetitive* because strong incentive to bring action caused by treble damages can prevent procompetitive conduct as well as anticompetitive conduct.

As far as Korea is concerned, Civil law prohibits *unjust enrichment*. Civil Law states that:

"The scope of damages compensated for breach of contract is actual loss. For the plaintiff to be compensated, the infringer should have intention or fault."[174]

The avoidance of unjust enrichment of the plaintiff is a basic principle of Korean Law and the generally accepted principle of damages actions is that plaintiffs can only recover the actual damages they have actually suffered.[175] Multiple damages such as treble damages may give greater compensation to parties than actual loss. However, it could be termed as 'unjust enrichment' because it is not related to actual loss. As I already said, the rationales of treble damages are deterrence, punishment and disgorgement of the illegal gains, as well as compensation.[176] However, in Korea, the primary objective of legal action is compensation not deterrence, punishment or disgorgement of illegal gain. Multiple damages such as treble damage could result in unjust enrichment.

In respect to the EU, the ECJ has touched upon the *principle of the prevention of unjust enrichment* in several proceedings in a non-competition law

---

2.4.3.3 which deals with controversial features of private actions in the US; See generally, Donald I. Baker, "Revising History-What have we learned about private antitrust enforcement that we would recommend to others?", Loyola Consumer Law Review, 2004, p. 384; Spencer Weber Waller, "The Incoherence of Punishment in Antitrust", p. 3.

[173] It can be a windfall to the lawyer only when the jurisdiction has a contingency fee system where the lawyer takes a percentage of the damages.; Eric McCarthy, Allyson Maltas, Matteo Bay and Javier Ruiz-Calzado, "Litigation culture and versus enforcement culture: A comparison of US and EU plaintiff recovery actions in antitrust cases", The Antitrust Review of the Americas 2007, p.38.

[174] Civil Law 393; In respect to unjust enrichment related to passing on defence, see section 4.3.2.3 which deals with passing on defence in Korea.

[175] Kwac Yun-Gik, supra note 27, p. 108 ; Kim Hyung-Bae, supra note 27, p. 237

[176] See section 3.2.4 which deals with rationales of treble damages.

context, regarding unlawful taxes and administrative charges.[177] In these cases, the ECJ has accepted the defendants' (Member States and the Community institutions') ability to invoke the principle of the prevention of unjust enrichment.[178] The important case to look at here is *Manfredi*,[179] where the ECJ merely accepted that the Member State (Italy) could take measures to prevent the unjust enrichment of those enjoying rights protected by Community law, but did not have to do so.[180] Given the stance of the Court in these cases towards the prevention of unjust enrichment, it could be argued that there cannot be unjust enrichment of the plaintiff, only that the Member States can prevent it if they want to.[181]

In conclusion, the introduction of the award of treble damages to plaintiffs may result in an excessive compensation and, therefore, generate unfair enrichment. It is submitted that this is an undesirable effect. Thus, the private enforcement of competition rules should guarantee the absence of any unfair enrichment of infringers but, at the same time, equally impede the unfair enrichment of the victims of any competition infringements.[182]

3.2.4.3.2 Over-Enforcement when there are Substantial Criminal Sanctions

There are two kinds of criminal sanctions, on individuals and companies. Criminal sanction includes fines and imprisonment but imprisonment can only be imposed on individuals. It can be argued that if there are substantial criminal sanctions, piling civil treble damages on top of criminal fines can be unnecessarily

---

[177] See e.g. *Just v. Danish Ministry for Fiscal Affairs*, case 68/79,[1980] ECR 501; *Express Dairy v. IBAP*, Case 130/79, [1980] ECR 1887; *Ireks-Arkady v. Council and Commission*, case 238/78,[1979] ECR 2955; *Comateb and Others v. Directeur général des douanes et droits indirects*, joined cases C-192/95 to C - 218/95, [1997] ECR I-165.

[178] See section 4.4.2 which deals with rationale of permitting passing on defence in the EU.; With regard to general introduction of unjust enrichment, see, R.S Franklin M. Fisher, "Economic Analysis and Antitrust Damages", World Competition, 2006, p. 386.

[179] The same point was made earlier too, in *Courage. See Courage v Crehan*, C-452/99, [2001]ECR I-6297at para 30.

[180] *Manfredi v. LIoyd Adriatico Assicurazioni SpA*, C-295/04, [2006] ECJ, 348.

[181] See section 4.4.2 which deals with rationale of permitting passing on defence in the EU; See also, *Manfredi v. LIoyd Adriatico Assicurazioni SpA*, C-295/04, [2006] ECJ, 348, para.?; See also, European Commission, "Commission Staff Working Document accompanying document to the White Paper on Damages actions for breach of the EC antitrust rules", SEC (2008) 405,para 191.

[182] Francisco Marcos and Albert Sánchez Graells, "Damages for breach of the EC antitrust rules: harmonising Tort Law through the back door?", InDret, 2008, p.10. And refer to *Devenish* here, where the CA equated the plaintiff and defendant as 'equally undeserving.'.

punitive and over-enforcing.[183]

Korea has substantial criminal sanctions for anticompetitive conduct such as cartels. Criminal fines for entering or operating cartel are more than 1,000 million Won and jail term at maximum is 3years.[184] These fines can be imposed on individuals as well as companies. This liability is related to intention. For instance, in the Oil Cartel, the KFTC imposed 100billion Won in surcharge[185] in 2001. In this Oil Cartel, 4 major oil companies colluded to fix the price and quantities produced for 12 years. In respect to this cartel, although no-one was imprisoned, the amount of the surcharge was substantial.[186]

US criminal fines are also substantial.[187] The Antitrust Criminal Penalty Enhancement and Reform Act of 2004 raised the maximum corporate fine to $100 million and the maximum individual fine to $ 1 million and the maximum Sherman Act jail term to 10 years.[188] Until 2004 felonies committed in infringement of the Sherman Act were only punishable by a fine of up to $10 million for corporations, and a fine of up to $350 000 and/or 3 years imprisonment for individuals.[189] The alternative sentencing procedures to the above fines,[190] enacted in 1984, gave the courts greater latitude in sentencing and dramatically increased the potential monetary penalties for criminal antitrust infringements because criminal fines could be based on *twice the loss to victims* or *twice the gain to antitrust infringers.*[191] In

---

[183] David Resenberg and James P. Sullivan, "Coordinating Private Class Action and Public Agency Enforcement of Antitrust Law", Journal of Competition Law and Economics, 2006, p.4.

[184] Competition Law 62(Criminal Sanctions) This statute uses the word 'cartel'.

[185] As discussed in section 2.1.2 which deals with introduction to the KFTC and the courts in Korea, a fine called as a surcharge because this fine could be imposed with the only corrective order.

[186] See the KFTC decision 2001.DAGA.

[187] William H. Page, supra note 166, p. 4; Jonathan B. Baker, supra note 5, pp.41-42. See generally, John Graubert, "Civil Remedies Available to the Federal Trade Commission", Federal Trade Commission, 2005 ; See eg, Joseph A Ostoyich and Arturo DeCastro, 'The Increasing risks of US litigation for global companies: Antitrust Review of the Americas", Global Competition Review, 2006

[188] Department of Justice release, Wednesday, June 23th, 2004, Assistant Attorney General for Antitrust, R. Hewitt Pate, "Issues statement on enactment of Antitrust Criminal Penalty Enhancement and Reform Act of 2004", www.usdoj.gov

[189] These figures were originally very low as compared to the benefit that a conspirator could get out of a cartel agreement. At the time of the passing of the Sherman Act, the offence was only a misdemeanour and the maximum fine was $5,000 until it was changed in 1973 to become a felony punished by much higher penalties.

[190] 18 U.S.C. § 3571(d) (2000).

[191] See Tefft W. Smith et al., "Finding the Right Price", Legal Times, Dec. 15, 2003, p. 32 (criticizing legislation raising fines under the Sherman Act in absence of attempts to reform sentencing guidelines); See also Steven J. Miller, "Remarks Before the Antitrust Section of the American Bar Association

practice, very large fines have been authorized and collected by enforcers. For example, a Swiss company, Hoffman-LaRoche, has paid over $1 billion in fines to the US.[192]

Given the substantial criminal sanctions, treble damages can over-enforce anticompetitive conduct which has already been punished by fines on companies by public enforcers. In the last ten years, the KFTC has imposed substantial surcharges on cartels amounting to several hundred billion Won to punish infringers and remove the profit from the infringers. Large fines and the potential for criminal sanctions on individuals, including prison sentences in Korea, create a powerful enforcement against illegal conduct such as cartels, without the need for treble damages.[193] For example, if a single anticompetitive activity such as a refusal to deal has been fined by the KFTC and is then the subject of exemplary damages actions, it could result in double liability both of public enforcers and private parties because it has already been punished, deterred or disgorged illegal gain by the KFTC.[194] Thus, it is submitted that it is not necessary to recognize treble damages.[195]

3.2.4.3.3 Over-Enforcement when there are Follow on actions

As I already mentioned, Section 5(a) of the Clayton Act provides for the prima facie effect of a criminal judgment.[196] In the US, very often, private enforcement follows criminal prosecution because a criminal judgment can be considered as evidence for the making of the case.[197] Without prior government action, private parties may lack the resources necessary to detect and prosecute

---

Remedies Foru, 2003, p.97 (expressing concern about a "pile on" mentality arising from civil treble damages on top of criminal double damages). www.abanet.org/antitrust/remedies/roundtable1.doc .

[192] Donald I. Baker, "The Use of Criminal Law Remedies to Deter and Punish Cartels and Bid-Rigging," 69 GEO. WASH. L. REV. 693, 2001, p.701; EC Commission Release, available at http:// europa.eu.int/eurlex /pri/en/oj/dat/2003/1_006/1_00620030110en000100089.pdf

[193] In respect to the substantial fines imposed by the KFTC see section 2.1.2.3 which deals with KFTC's statistics of case handling from 1998 to 2007.

[194] Lee Bong-Hee, "Effective Enforcement of Competition Law", 10 Competition Law Journal 1, 2004, p.20

[195] See section 2.1.2.3 which deals with the KFTC statistics of case handling from 1998 to 2007.

[196] See section 1.3.1. 4 which deals with stand-alone and follow-on actions.

[197] Patricia Hanh Rosochowicz, supra note 79, p.6

anticompetitive conduct.[198] In the US, it has been shown how important follow-on actions of the antitrust laws were to the early development of treble damages actions.[199] In the 1960s, 75% of all individual actions followed on from government led actions.[200] It is argued by critics of the present US law that mandatory trebling may present a problem of overkill,[201] in those cases where there has been a prior criminal conviction since *prima facie evidence*[202] increases a defendant's risk of facing a civil action.[203]

Thus, if most of the private actions follow the prosecution, it can be argued that it causes over-enforcement, leaving the prospect of paying treble damages in addition of a public fine.[204]

3.2.4.3.4 Undermining Amnesty and Leniency Programmes

To achieve optimal enforcement of competition law, it is important to ensure efficient cooperation between private parties and public enforcers. Multiple damages such as treble damages can impair this cooperation because infringers who cooperate with public enforcers could face private treble damages actions unless measures are specifically taken to avoid this happening.

One of problem of interaction between private actions and public enforcers concerns Leniency programmes. The purpose of Leniency programmes is to reward entities who reveal cartel activity to the public competition enforcers in exchange for not being prosecuted or receiving a lesser fine. A leniency programme can potentially be utilized in any jurisdiction where such conduct is treated as a criminal,

---

[198] P. Friedman, D. Gelfand et al., supra note 138, p.156.
[199] See Comment, "Consent Decrees and Private Actions: An Antitrust Dilemma" 53 California Law Review, 1965, p.627; See Kauper and Snyder in L. White, "Private Antitrust Litigation: new evidence, new learning", MIT Press, 1988, p. 329.
[200] Jones, "Antitrust private enforcement in the EU, UK and USA", Oxford, 1999, p.16.
[201] In respect to overkill, see section 1.4.2.2 which deals with over-enforcement.
[202] A *prima facie evidence* means if public enforcers such as the DOJ has a verdict of infringement of antitrust law which could be persuasive evidence in third parties' legal action.
[203] Charles B. Casper, "The Class Action Fairness Act's Impact on Settlement", Antitrust, 2005, p.26; Donald I. Baker, "Revising History-What have we learned about private antitrust enforcement that we would recommend to others?", 16Loyola Consumer Law Review, 2004, p. 389; Franklin M. Fisher, supra note 178, p.391
[204] See American Bar Association Section of Antitrust law, "Comment on remedial use of disgorgement", 2002, p. 6.

civil or administrative offence.[205] In many jurisdictions Leniency programmes have been adopted.[206]

As far as US Antitrust Division's *Corporate Leniency Program* (hereafter, *Amnesty Program*) is concerned, under the US leniency programme antitrust infringers can escape criminal prosecution if they report criminal activity to the public competition enforcers.[207] This *Amnesty Program* is considered to have been enormously successful.[208] However, treble damages could obstruct the efficiency of Amnesty program. The chance of fact the probable imposition of treble damages decreases the comparative attractiveness of the Amnesty Program.[209] To solve this problem, legislation passed by Congress in 2004 provided that parties participating in the Antitrust Division's Amnesty Program would be liable to only single and not treble damages and would not be jointly and severally liable for all of the damages recoverable from all of the cartelists.[210] This legislation providing single damages for whistle blowers on the Amnesty Program was driven by the concern that treble damages in follow on civil actions dissuade conspirators from cooperating with the government and availing themselves of the benefits of the Amnesty Program.[211]

Korea also has a *Leniency Programme.* Thus, there is possibility for Korea to have similar problems if Korea adopts multiple damages such as treble damages.[212]

---

[205] U.S. Dep't of Justice Antitrust Div., P 13,113, at 20, 649-21; U.S. Dep't of Justice Antitrust Div., P 13, 114, p. 20, 649-22.

[206] Korea, the US, the EU and most Member State of the EU including the UK have *Leniency Programmes* for whistle blower for cartel. In the US, *Cartel deterrence package* is the DOJ's *amnesty program.* The compliance of this programme comes from undertakings thinking that if they infringe the rules their co-conspirators may turn them in to the competition authorities.

[207] U.S. Dep't of Justice Antitrust Div., "Prosecutorial Amnesty-- Whistle blowing Conspirators," in 4 Trade Reg. Rep. (CCH) P 13,112, at 20,649- 21 (Aug. 16, 1994).

[208] See generally, J. Harrington, "Corporate Leniency Programs and the Role of the Antitrust Authority in detecting Collusion", International Symposium in Japan Fair Trade Commission, 2006.

[209] Department of Justice release, Wednesday, June 23th, 2004, Assistant Attorney General for Antitrust, R. Hewitt Pate, "Issues statement on enactment of Antitrust Criminal Penalty Enhancement and Reform Act of 2004", www.usdoj.gov; Donald I. Baker, "The Use of what ?? This is incomplete; EC Commission Release", available at http:// europa.eu.int/eurlex/pri/en/oj/dat/2003/1_006/1_ 00620030110en 000100089.pdf ; Donald I. Baker, supra note 192, pp. 707-710, 713.

[210] Antitrust Criminal Penalty Enforcement and Reform Act of 2004, Pub. L. 108-237, s.213; To assist the government to discover and prosecute wrongful conduct and to encourage infringers to cease their illegal acts, the Antitrust Division has developed a *Leniency Program* covering both corporations and individuals. ; Pub. L. No. 108-237, § § 212-221, 118 Stat. 661, 666-69 (2004).

[211] See section 3.3.4.4. which deals with impairing the cooperation of public and private enforcement.

[212] Competition Law 60(Leniency Programme)

In respect to the EU Leniency programme, it is claimed that the most successful period of cartel enforcement in the history of the Directorate General for Competition (DG Competition) is being greatly aided by this Leniency Notice. Thus, successful operation of the Leniency Notice is being potentially jeopardized by private damages actions.[213] To ensure effective Leniency programme, the Commission's Leniency Notice has been revised (2006)[214] specifically to take account of the undesirability of allowing leniency documents.

3.2.4.3.5 Deterring Pro-Competitive Activity and Inhibiting Competition

To balance encouraging private enforcement and avoiding abuse of litigation, the fundamental argument is that "the modern corporate managers having tendency to be risk averse and fear of treble damages leads corporate managers to shy away from conduct which, although permissible, may fall close enough to the mythical line separating legality from illegality to trigger a lawsuit."[215]

It is therefore argued that mandatory treble damages can chill pro-competitive conduct. Treble damages can provide individuals with strong incentives to bring damages actions against pro-competitive as well as anti-competitive conduct because treble damages can create too great an incentive for potential plaintiffs.[216] Also, it is said that the possibility of treble damage liability could deter companies from engaging in pro-competitive conduct and could be put under pressure to settle out of fear that this lawful conduct may be prosecuted and be subject to treble damages actions.[217] Furthermore, although treble damages could reduce the

---

213 Declan J. Walsh, "Carrots and Sticks- Leniency and Fines in EC Cartel Cases", ECLR 30(1), 30-35, 2009, p.31.

214 European Commission, "Commission Notice on Immunity from fines and reduction of fines in cartel cases", 2006/C298/11, OJC298, 8.12.2006 available at http://eur-lex.europa.eu/LexUriServ/site/en/oj/2006/c_298/c_29820061208en00170022.pdf

215 Cavanagh, supra note 139, p. 802.; David Besanko and Daniel F. Spulber, "Are Treble Damages Netural? Sequential Equilibrium and Private Antitrust Enforcement", American Economic Review, 1990, p. 870

216 Eric McCarthy, Allyson Maltas, Matteo Bay and Javier Ruiz-Calzado, "Litigation culture and versus enforcement culture : A comparison of US and EU plaintiff recovery actions in antitrust cases", Antitrust Review of the Americas 2007, p.38.

217 John Pheasant, "Damages Actions for Breach of the EC Antitrust rules: The European Commission's Green Paper", E.C.L.R., 2006, p.368; John Calvin Jeffries, Jr., "A Comment on the Constitutionality of Punitive Damages", 72 Va. L. Rev., 1986, p.142; See generally William Breit and Kenneth G. Elzinga, supra note 126, pp. 43-50; Richard A. Posner, "Antitrust In The New Economy", 68 ANTITRUST L.J. 935, 2001; Michael L. Denger and D. Jarrett Arp, "Does Our Multifaceted Enforcement System Promote

incentives of firms to infringe the antitrust laws, they may also increase their incentives to use the antitrust laws strategically against their rivals.[218] According to this argument firms could use the powerful threat of treble damages to extort money from successful rivals because mandatory trebling so inflates the defendant's cost of losing and the plaintiff's value of a victory.[219] So faced with potential numerous million- or billion-dollar treble awards, companies could readily avoid engaging in pro-competitive activities.[220] Trebling damages against their successful rivals could therefore discourage their rivals from efficiency-improving conduct.[221] Although clandestine cartels are never efficiency producing and pro-competitive other forms of conduct, especially unilateral conduct, may be pro-competitive or anticompetitive, depending on a range of complex factors. Treble damages should at least be limited to cartels. Thus, it is necessary to consider removing treble damages from open and non-clandestine conduct as discussed in 3.2.5 and 3.3.

3.2.5 Is Mandatory Trebling Desirable for Optimal enforcement?

In view of the considerations above, it is submitted that a private enforcement system should be evaluated in terms of how successfully it helps to implement optimal enforcement without unreasonably deterring legitimate business activities or unnecessarily burdening the judicial system. In other words, it depends on how efficiently treble damages can deter and prohibit illegal conduct, while providing a

---

Sound Competition Policy"?, 15 Antitrust, Summer 41, 2001, p. 43; W. M. Landes, supra note 126, p. 678; R. Preston McAfee, Hugo M. Mialon and Sue H. Mialon, "Private Antitrust Litigation: Procompetitive or Anticompetitive?", 2005, p.2–6 *available at* http:// papers.ssrn.com/ sol3/ papers.cfm/abstract.

[218] See R. Preston McAfee, Hogo M. Mialon, Sue H. Mialon, "Private v. Public Antitrust Enforcement: A Strategic Analysis", Emory Workshop, 2005, p.7; Christian Miege, "The Role of Private Enforcement of Competition Law in the EU and the German Attempts in the 7th Amendment of the GWB", Amsterdam Centre for Law and Economics Workshop, 2005, p.5; William F. Shughart II, "Private Antitrust Enforcement: Compensation, Deterrence, or Extortion?" Regulation Magazine Vol. 12 No.3, 2006, p. 2; See generally, Deward A. Snyder and Thomas E. Kauper, "Misuse of the Antitrust Laws: The Competition Plaintiff", 90 Michigan Law Review 551, 1991.

[219] Johan Ysewyn, "Private Enforcement of Competition Law in the EU: Trials and Tribulations", International Law Practicum, 2006, p.15. It is submitted that mandatory trebling can have a similar effect on the amount of settlements and deterrence of litigation in cases following on a criminal conviction or guilty plea for price-fixing or market-allocation. However, in such cases the deterrence rationale for mandatory trebling is much weaker.

[220] Donald I. Baker, "Revising History-What have we learned about private antitrust enforcement that we would recommend to others?", Loyola Consumer Law Review, 2004, p. 391.

[221] R. P. McAfee et al., supra note 218, p. 7.

fair and efficient way of compensating victims.

It has been argued that treble damages may be optimal if the probability of detecting and penalizing the offence is less than one in three.[222] Trebling may therefore be necessary in covert cases such as cartel because conspiracies impair the competitive market and their clandestine and secret character makes it difficult to detect and prosecute them.[223] If the probability of detection is one in three primarily for concealable offenses such as cartels treble damages could be optimal.[224] It seems appropriate therefore to treat them with criminal liability or treble damages.[225] However, as I have already seen above, trebling is neither fair nor desirable in every case.[226] Treble damages have been described as costly and leading to over-deterrence in some cases.[227] Limiting the multiplier to cartels makes sense, because exclusionary practices and mergers are ordinarily open and easy to detect. Thus, there is no need for strong incentive such as treble damages for those open anticompetitive conducts.[228] Mandatory trebling can over deter in those competition cases where unlawful conduct that is not concealed, such as tying, exclusive dealing and monopolistic overcharges.[229] In these open conduct cases, recovery of actual damages can serve as a sufficient incentive to bring an action. In the case of non-clandestine conduct, more potential plaintiffs would bring actions

---

[222] See Wouter P.J. Wils, supra note 149, p. 24-26; A. Mitchell Polinsky and Steven Shavell, "Should Liability Be Based on the Harm to the Victim or the Gain to the Injurer?", 10 J.L. Econ. & Org. 427, 1994, p. 427.

[223] See section 3.2.4 which deals with deterring future infringements by recognizing multiple damages; Frank Easterbrook, supra note 140, p. 450.

[224] W. M. Landes, suppra note 127, p.657.

[225] Edward Cavanagh, supra note 122, p.171; Donald I. Baker, "Revising History-What have we learned about private antitrust enforcement that we would recommend to others?", Loyola Consumer Law Review, 2004 , p.407.

[226] See section 3.2.4 which deals with problems of treble damages; see also, Edward D. Cavanagh, supra note 138, p.847; Diane P. Wood, "Antitrust at the Global Level", University of Chicago Law Review, 2005, p.323.

[227] See Alfred L Parker, "The Deterrent Effect of Private Treble Damage Suite: Facts or Fantasy," 3 New Mexico Law Review 286, 1973, p. 286; Malcolm E. Wheeler, "Antitrust Treble-Damage Actions: Do They Work?,", 61 California Law Review 1319, 1973, p. 1319. See Herbert Hovenkamp, "Economic And Federal Antitrust Law", 1985 at § 15.6; Herbert Hovenkamp, "Federal Antitrust Policy: The Law of Competition And Its Practice", 2d ed. 1999 at § 17; Richard A. Posner and Frank H Easterbrook, "Antitrust Cases, Economic Notes, And Other Materials", 2d ed., 1981, p.542–545; E. Thomas Sullivan & Jeffrey L. Harrison, "Understanding Antitrust And Its Economic Implications"(2rd ed.) 1994 at § 3.02; Steven C. Salop and Lawrence J. White, "Private Antitrust Litigation: An Introduction and Framework", in 「Private Antitrust Litigation: New Evidence, New Learning」 (Lawrence J. White ed.), 1988, p. 31–34 ; William Breit, "Efficiency and Equity Considerations", 8 SW. U. L. REV., 1976, p. 539; Herbert Hovenkamp, "Treble Damages Reform", 33 Antitrust Bulletin, 1988, p. 233

[228] Frank Easterbrook, supra note 140, pp. 458-461.

[229] See generally Edward D. Cavanagh, supra note 139, pp. 831-832.

because it is easier them to detect illegal conduct and get evidence of breaches of antitrust law. Mandatory trebling creates significant incentives for private parties to enforce the antitrust laws as private attorneys general. If treble damages are imposed on open conduct, over-enforcement could occur over-compensation because treble damages do not reflect the actual damage suffered.[230]

For example, in the US the lure of treble damages and one-way costs[231] may cause a plaintiff or plaintiffs' lawyer to try to turn any possibly competition-related dispute into a private antitrust case. In other words, treble damages encourage "any imaginative lawyer to try to repackage a business tort into an *antitrust box* whenever it is plausible to do so".[232]

Given the above US cases and practices, it can be seen that treble damages can result in excessive private enforcement and induce parties to make wasteful efforts in finding infringers. It can result in over-enforcement. Furthermore, if infringers have already been fined by public enforcers, treble damages can result in over-enforcement. This over-enforcement also comes at a cost to the judicial system.[233] It can consume large amounts of judicial resources by tying up court time and personnel. If full compensation is achieved through actual damage, private enforcement will restore the market to the state it was in before the illegal conduct occurred without any treble damages. It is possible to create civil or criminal sanctions sufficient to deter or punish wrongdoers or disgorge illegal gain through substantial fines[234] or criminal sanctions.[235] It is possible to formulate sanctions

---

[230] Ilya Segal, Michael Whinston, "Public VS Private Enforcement of Antitrust Law: A Survey", 5E.C.L.R.306, 2007, p.311-312.; Donald I. Baker, "Revising History-What have we learned about private antitrust enforcement that we would recommend to others?", 16 Loyola Consumer Law Review 379,2004, p.384 ; Malcolm E. Wheeler, "Antitrust Treble-Damage Actions: Do They Work?," 61 California Law Review 1319, 1973, p.1319; Francisco Marcos et al., supra note 182, p. 10 ; Alfred L Parker, supra note 227, p. 286.

[231] One-way cost means if plaintiff loses the action it does not have to pay back the litigation costs of defendant. On the other hand, if the defendant loses the action, it has to compensate for the litigation cost of plaintiff.

[232] *Copperweld Corp. v. Independence Tube Co.*, 467 U.S. 752, 771-74 (1984) In *Copperweld Corp.* case, the Supreme Court has tried to prevent abuse of litigation caused by strong incentive such as treble damages in competition area. This case is a good example of negative effect of treble damages; See also Donald I. Baker, "Revising History-What have we learned about private antitrust enforcement that we would recommend to others?", 16 Loyola Consumer Law Review 379, 2004, p. 385.

[233] See generally, Edward A. Snyder and Thomas E. Kauper, "Misuse of the Antitrust Laws: The Competition Plaintiff", 90 Michigan Law Review551, 1991.

[234] In Korea, the fine charged by the KFTC is surcharge because it is imposed on with only corrective order of the KFTC. See section 2.1.2.3 which deals with KFTC's statistics of case handling from 1998 to 2007.

aimed at disgorgement, although the calculation and measurement of the profit may be difficult. Thus, it is submitted that deterrence, punishment and the disgorgement of illegal gain should be achieved through public enforcement not through private actions with the inherent risk of over-enforcement.[236]

It should be noted that the US Congress has already engaged in selective de-trebling. It recognized that actual damages in R&D joint ventures and export companies whose participants have notified the Antitrust Division of their existence in the event an infringement is reasonable.[237] The de-trebling in cases where infringers were beneficiaries of the of the new leniency program was one of the Division's core missions to ensure the effect of its anti-cartel enforcement program and it achieved this with the passing of the 2004 Act[238].

As far as the Korean Leniency Program is concerned, the KFTC views the Leniency Programme[239] as a key element of its enforcement policy because it has been useful for detecting and cracking cartels most notably in the international cartel situations. Over the last ten years, the KFTC's Corporate Leniency Program has been responsible for detecting and cracking more international cartels.[240] It is, unquestionably, the single greatest investigative tool available to anti-cartel enforcers. An effective Leniency Program will lead cartel members, in some cases,

---

[235] See generally, John M. Desiderio, "Private Treble Damage Antitrust Actions: An Outline of Fundamental Principles", 48 Brooklyn Law Review 409, 1982; Ulf Boge, Konrad Ost, "Up and Running, or Is It? Private Enforcement –The Situation in Germany and Policy Perspectives", 27(4)E.C.L.R., 2006, p. 201-202; Marjorie Holmes, Lesley Davey, "Competition Enforcement in the European Union: A Three-way Partnership", Defence Counsel Journal, 2005, p. 35; Clifford A. Jones, "Private Enforcement of Antitrust Law in the EU, UK and USA", Oxford, 1999, p. 20; William B. Tye, Stephen H. Kalos, "Antitrust Damages from Lost Opportunities", Practicing Law Institute- Corporate Law and Practice Course Handbook Series, PLI Order No. B0-00D3, 1998, p. 330-331; Donncadh Woods, "Private Enforcement of Antirust Rules: Modernization of the EU Rules and the Road Ahead", Loyola Consumer Law Review, 2004, p. 437 ; Clifford A. Jones, supra note 124, pp.410-411

[236] Tim Reher, "The Commission's White Paper on Damages Actions for Breach of the EC Antitrust Rules", European Antitrust Review, 2009, p. 1.

[237] 15 U.S.C. § 4301 (2000); Export Trading Company Act, 15 U.S.C. § 4016(b)(1) (1982); National Cooperative Research and Production Act, 15 U.S.C. § 4304(a) (1992). In these instances, Congress also provided a *loser pays cost rule*, to make the litigation less attractive to private plaintiff ; see also Donald I. Baker, "Restating Law and Refining Remedies: The Trading Company Act, The Joint Research Act and The Local Government Antitrust Act", 55 Antitrust Law Journal 661, 2004, p. 666-669.

[238] Antitrust Criminal Penalty Enforcement and Reform Act of 2004, Pub. L. 108-237, s.213. For detail, see section 3.3.3.4 which deals with undermining amnesty and Leniency Programmes.

[239] "Detecting and Deterring Cartel Activity through an Effective Leniency Program", Address Before the International Workshop on Cartels, 2007, p. 1-2

[240] See KFTC 2004 Annual Report, "Detecting and Deterring Cartel Activity through an Effective Leniency Program", 2005, p.98.

to confess their conduct even before an investigation is opened. If Korea adopted multiple damages such as treble damages, it could undermine its Amnesty and Leniency Programmes.

As I already noted[241] as far as the Member States of the EU are concerned, currently, no Member State provides for treble damages in competition area.

The White Paper has reiterated the desire of the European Commission to promote private actions, but it has retracted the option for double damages which was suggested in the Green Paper and instead suggests "full compensation for the real value of the loss suffered."[242]

Given, as is submitted, that optimal enforcement could be achieved by an efficient combination of private and public enforcement, it is desirable for adopting discretionary trebling to eliminate the perceived harshness and arbitrariness of mandatory trebling. As I already mentioned, every anticompetitive conduct does not need multiple damages. Cartel, bid-rigging or abuse of dominance position could need to recognize multiple damages because these illegal practices could substantially harm competitive market and consumers. Thus, discretionary rather than mandatory trebling is desirable. Commentators have advised that if the Legislature of the US selectively chooses to de-treble damages in certain cases, it should proceed with the utmost caution.[243]

3.3 Conclusion: Should Korea adopt exemplary, restitutionary or multiple damages

Aspects of deterrence as well as compensation could justify either the introduction of exemplary, restitutionary or multiple damages such as treble

---

[241] See section 3.2.2 which deals with the current situation in respect of the criteria and measurement of damages in the EU.

[242] European Commission, "White Paper--Damages Actions for Breach of the EC Antitrust Rules, COM (2008) 165 available at http://ec.europa.eu/competition/antitrust/ actionsdamages/files_white_paper/ whitepaper _en.pdf.

[243] See generally, David Klingsberg, "Balancing the Benefits and Detriments of Private Antitrust Enforcement: Detrebling, Antitrust Injury, Stanidng, and Other Proposed Solutions", Cardozo L. Rev 1215., 1987-1988.

damages. However, it can be questioned where exemplary, restitutionary or multiple damages are necessary or even desirable to ensure optimal enforcement in Korea.[244]

Given above rationale of exemplary, restitutionary or treble damages, it is possible to argue that to encourage private enforcement, the traditional reluctance in Korea for exemplary, restitutionary or multiple damages must be changed.[245] It can be also be argued that it is desirable for Korea to provide for more than single damages in cases of the most serious covert anticompetitive infringements such as cartels because of the difficulty of detecting and prosecuting them.[246] Exemplary, restitutionary or multiple damages can create a strong incentive for plaintiffs to bring actions against the cartel. It is arguable that to encourage private enforcement, US treble damages are better than exemplary or restitutionary damage because the amount of treble damages can impose a bigger burden than exemplary or restitutionary damages on infringers.

However, a court could impose very large exemplary and restitutionary damages, if these were available, just as big as treble damages. Compared to mandatory treble damages, it can be also argued that the application of exemplary or restitutionary damages is more flexible and may be more easily adjusted to both the impact of *compensation* and *deterrence.* However, it is submitted that exemplary, restitutionary or multiple damages should not be allowed because they are incompatible with Korean legal tradition. Korean legal tradition was and still is to compensate actual damage and to prohibit overcompensation and multiple liabilities because overcompensation and multiple liabilities contradict prohibition of unjust enrichment. Exemplary or mandatory multiple damages may be essential to fighting anticompetitive conduct such as cartel. However, it is still impossible to depart from 'tradition', because civil law and competition law have never allowed multiple damages such as US treble damages.

---

[244] For an assessment of the effectiveness of the public competition enforcer (OFT) in the UK, see generally, "Positive Impact – An initial evaluation of the effect of the competition enforcement work conducted by the OFT", OFT 827, 2005.

[245] In respect to criteria and measurement of damages, see section 3.2 which deals with the current situation in respect of the criteria and measurement of damages in the EU, UK, US and Korea.

[246] See section 3.2.5 which deals with the desirability of mandatory trebling of damage for optimal enforcement.

There are five major obstacles to the adoption of exemplary, restitutionary or multiple damages in Korea.

Firstly, the principally compensatory nature of damage actions in Korea conflicts with the idea of exemplary, restitutionary or multiple damages. As I have already discussed,[247] the purpose of a damages award is to put the plaintiff in the position it would have been in if the infringement had not been committed. Korean legal tradition has hitherto avoided exemplary, restitutionary or multiple damages because they bear no specific relation to the actual loss suffered. As I discussed above,[248] exemplary, restitutionary or multiple damage have nothing to do with compensating plaintiffs.[249] Without exemplary, restitutionary or multiple damage, plaintiffs could have full compensation through compensatory damages which provide payment for economic losses including lost profit or interest. Korean Civil Law makes it clear that the damages which may be awarded include all monetary awards in respect of the relevant infringement without introduction of exemplary, restitutionary or multiple damages.[250]

Putting the obvious compensatory role of damages aside, exemplary or restitutionary or multiple damages could play a role of deterrence or punishment by giving monetary award to redress caused by the infringer.

As discussed earlier,[251] in the US the primary objective of private enforcement is to ensure effective deterrence not compensation even if it causes over-compensation to plaintiff.

If punishment, deterrence or disgorgement of illegal gains is required, it is more desirable to achieve these by public enforcers such as the KFTC rather than

---

[247] See section 3.2.1 which deals with the current situation in respect of the criteria and measurement of damages in Korea.
[248] See section 3.2.1 which deals with the current situation in respect of the criteria and measurement of damages in Korea.
[249] See Prosser, "Wade & Schwartz's Torts", Victor E. Schwrtz et al., eds., 10th ed., 2000 p. 549-550
[250] Civil Law 359, 750; Byung-Ju LEE, "The Harmonization of Public and Private Enforcement: A Korean Perspective", The 5th Seoul International Competition Forum, 2008, p. 3.
[251] See section 1.2.3 which deals with objective of private enforcement.

by private actions. As far as deterrence, punishment or disgorgement of illegal gain is concerned, public enforcers such as the KFTC are more robust than private parties, with increases not only in civil fines and penalties but also in criminal sanctions. If heavy enough, a public sanction such as properly calculated surcharges and criminal sanctions including prison sentences could create a powerful effect of deterrence, punishment or disgorgement of illegal gain without the need for exemplary, restitutionary or multiple damages.

Liability in damages actions relating to infringements of competition law should be about compensation and should not be used to punish companies. The additional deterrence or punishment provided by private enforcement has become correspondingly less meaningful. There is no reasonable justification for introducing exemplary, restitutionary or multiple damages that make an exception for competition law litigation as compared with other types of civil actions in Korea. It is therefore submitted that it is desirable to pursue compensation, not deterrence, punishment or disgorgement of illegal gain through damages actions.

Secondly, double liabilities could be incurred when defendants are assessed exemplary, restitutionary or multiple damages awards for the same anticompetitive conduct that has already been punished by public enforcers.[252] If public enforcers have already pursued disgorgement or punishment by sanctions, exemplary, restitutionary or multiple damages awards for the same anticompetitive behavior could cause duplicative recovery.

However, US law does not consider fine plus damages to constitute double liability which is different from that of Korea.[253]

Thirdly, recognizing exemplary, restitutionary or multiple damages can result in over-compensation. Korean legal tradition has prevented over compensation

---

[252] Civil Law 867

[253] Besides problem of double liability of public enforcers and private enforcers, in the US, there is a possibility of multiple punitive damages in many state and federal jurisdiction. However, it is distinctive problem restricted to the US; In respect to multiple punitive damages, see section 6.5.2.2 which deals with problems created by class action in perspective of defendant in the US; In respect of multiple punitive damage, see John Calvin Jeffries, supra note 217, p. 142.

because it is not related to actual loss.[254] Compensation should not generate unjustified wealth for the victim.[255] The obligation to compensate should not be transformed into an excessive and disproportionate overload of the infringer.[256] With exemplary, restitutionary or multiple damages awards, individual plaintiffs can receive unfair compensation which could be unjust enrichment itself. These damages could transfer the unfair enrichment from defendant to plaintiff. Such a transfer is thought undesirable in Korea because it can cause unjust enrichment to the victim. If exemplary, restitutionary or multiple damages were allowed, over-enforcement comes at a cost, both to the judicial system and the economy because damages actions can consume a large amount of business and judicial resources. When Korea adopts legal ideas from other jurisdictions, it is necessary for it to avoid the negative aspects experienced in those other jurisdictions, particularly, in this instance, those which have occurred in the US. As I already mentioned, under Korean legal tradition, damages actions have the main objective of compensation not deterrence, punishment or disgorgement of illegal gain. Korea strictly prohibits over-compensation.

Fourthly, exemplary, restitutionary or multiple damages can cause over-enforcement because such damages could produce strong incentives to bring actions with the mere aim of reaching a settlement as is sometimes the case in the US.[257]

Fifthly, exemplary, restitutionary or multiple damages would lessen the incentive to apply for leniency programme. Korea provides leniency for undertakings which reveal cartel activity to the KFTC, as does the EU and UK.[258]

---

[254] I will discuss unfair enrichment in section 3.3.3 which deals with the problems of mandatory treble damages and the desirability or otherwise of introducing them in other jurisdictions.
[255] In respect to unjustified wealth for the victim in competition area, it is worh considering European articles because there are not a lot of discussions of it in Koera competition area. Thus, see Jukka Ahtela, "Response to Green Paper-Damages actions for breach of the EC antitrust rules", Confederation of Finnish industries EK, 2006, p. 4; Romanian Competition Council, "Public consultation on the Green Paper-Damages actions for breach of the EC antitrust rules", Position of the Romanian Competition Council, 2006, p. 9.
[256] Jukka Ahtela, Ibid. ; Romanian Competition Council, Ibid.
[257] See section 3.2.4 which deals with the current situation in respect of criteria and measurement of damages in the US.
[258] See Korea leniency programme 2009. The KFTC has revised leniency programme many times.

Given the above reasons, it is submitted that there is no justification for the introduction in Korea of exemplary, restitutionary or multiple damages.[259] The recovery of actual damages can serve as a sufficient incentive to bring damages actions. In particular, exemplary or multiple damages are not justified, where significant sanctions have already been imposed for breach of competition law. Once the plaintiffs have obtained compensation, it is not logical to punish the defendant for the same anticompetitive conduct by exemplary, restitutionary or multiple damage where the public enforcers have already done this.[260]

In respect to the importance of creating the right balance between private and public enforcement, it is submitted that the correct approach to deterrence, punishment and disgorgement of illegal gains is that these matters must remain the domain of competition authorities and they must not become the task of private parties. Competition law would be ideally best enforced and monitored by public enforcement in their role of preserving or restoring competition without exemplary, restitutionary or multiple damages. Illegal gains can be recovered by means of any sanctions imposed by the public enforcer such as the KFTC. To disgorge such illegal gains, for instance, it must consider whether the sanctions the KFTC imposes can be calculated to be more in line with the amount of profit made by the infringers.

Thus, given substantial civil fines and criminal sanctions[261] in Korea and the apprehension of US abuse of litigation, damages actions must be about compensation and they must not be used to punish companies. The guiding principles of private enforcement for damage caused by anticompetitive conduct should be compensation of victims and the danger of over-deterrence caused by excessive litigation and unmeritorious law suits should be prevented.

---

[259] See section 3.3.4 which deals with the problems of treble damages.

[260] See, e.g., Victor E. Schwartz and Leah Lorber, "Death by a Thousand Cuts: How to Stop Multiple Imposition of Punitive Damages", Briefly(National Legal Center for the Public Interest), Dec. 2003, p. 1 (explaining that although common sense informs a parent's decision to "not punish a child more than once for the same wrong-doing," the U.S. "civil justice system has strayed from common sense and basic fairness").

[261] There is the possibility of prosecuting individuals by criminal sanctions in Korea.

Chapter 4. The Passing on Defence

4.1 Overview of the Passing on defence

4.1.1 Definition of the Passing on defence

The passing on defence is where a defendant denies liability on the basis that the plaintiff has passed on the illegal overcharge to his own customers. The passing on issue only addresses the passed on overcharge. The harm from the overcharged price is composed of the actual loss and the loss of profit.[1] Under the passing on defence a defendant can therefore argue that a plaintiff's loss has been reduced or negated by the plaintiff having passed on to his customer all or a proportion of any overcharge resulting from the defendant's actions and that, as a consequence, the defendant should not be liable to compensate the plaintiff for a loss which, ultimately, the latter has not borne.[2]

For example, if an undertaking enjoying a dominant position or participating in a cartel sells its products at overcharged prices, the direct purchasers of these products such as wholesalers will pay the overcharged price. However, these direct purchasers could be in a position to mitigate their economic loss by passing the overcharge on to their own customers and thus suffer no loss. In other words, the overcharge may not represent the totality of the direct purchasers' loss because the damage caused by the anticompetitive conduct is suffered entirely or in part by the ultimate purchaser such as consumers.

4.1.2 Crucial Issues of the Passing on Defence

Two main problems arise in respect of the passing on defence.

---

[1] Commission Staff Working Paper accompanying the White Paper on Damages actions for breach of the EC antitrust rules, SEC (2008) 404 at para 201.

[2] Customer includes indirect purchasers such as consumers from the overcharged price; Greg Olsen, "Actions for damages are Compensation and deterrence? Passing on defence and the future direction of UK private proceedings", CLI 4.8(3), 2005, p.1; Foad Hoseinian, "Passing on Damages and Community Antitrust Policy: An Economic Background", 28(1) World Competition 3, 2005, p. 3.

Firstly, the question is whether the so-called passing on defence should be allowed or not in damages actions for breach of competition rules. If a customer is able to pass on all or part of his loss to the next purchaser in the chain, should he be compensated for the whole loss or only for an amount reduced by what he has been able to pass on?

It is submitted that the key determinants of permitting passing on are i) the nature of the damages to which a plaintiff will be entitled ii) the nature of the market on which the plaintiff's damage has occurred iii) the time scale over which the damage has occurred and iv) the effects of the overcharge on the position of the plaintiff and its competitors. These key determinants could be applicable to all jurisdictions.

For instance, in an analysis of the passing on defence published in 1980 Harris and Sullivan contended that the passing-on of the overcharge to indirect purchasers depends mainly on the structure of the market and the elasticity of the demand and supply on the market.[3] In general, the more competitive the downstream market where the plaintiff operates, the less the likelihood of passing on occurring.

Secondly, the passing on defence is related to indirect purchaser actions brought by indirect purchasers to whom the overcharge has been passed. Indirect purchaser actions are sometimes called as the passing on *offence*. In theory the passing on defence could be pleaded against a customer in a situation where the supplier is also faced with parallel or consecutive actions brought by purchasers at other levels of the distribution chain.[4] When designing a private competition enforcement regime, each jurisdiction faces a crucial policy choice as to whether to allow the passing-on defence and (if it does) whether to allow standing to indirect purchasers. If the passing on defence is prohibited and the passing on offence is

---

[3] Robert G. Harris, Lawrence A. Sullivan, "Passing on the Monopoly Overcharge: A Comprehensive Policy Analysis", 128 University of Pennsylvania Law review 269, 1980, p. 273.
[4] See, in particular, Hoskins, H., "Garden Cottage Revisited: The Availability of Damages in the National Courts for Breaches of the EEC Competition Rules" 6 E.C.L.R., 1992, p. 257.

allowed, many problems can arise related to aggregation, calculation and distribution of damages between direct and indirect purchasers. Indirect purchaser actions are further discussed Chapter V.

Therefore, in this Chapter, firstly, I discuss importance of the passing on defence and the problems of permitting it. Secondly, I deal with the position in the US. The reason for dealing with the US ahead of the other jurisdictions is that the US has particularly striking rules on the passing on defence, embodied in the *Hanover Shoe* case.[5] After discussing the position in the US, I look at the position in Korea, the EU and the UK before concluding whether or not Korea should consider changing its present stance on the issue.

4.1.3 Importance of the Passing on Defence

Anticompetitive activities often harm an indeterminable number of direct and indirect purchasers because the production of goods or services frequently involves a number of intermediate markets or firms. Anticompetitive activities can therefore spill over into several markets.[6] As one includes more layers further down the vertical chain, it typically tends to increase the number of victims due to the fact that the damage tends to be spread over numerous remote parties.[7] Purchasers at each level, including final consumers, may face higher prices and a restricted choice between products and services because of an overcharged price at any level through the formation of a cartel or an abuse of market power.[8]

Whether or not the passing on defence is permitted is important in respect of the optimal enforcement of competition law because it influences the incentives of plaintiffs to bring actions.[9] Furthermore, the passing on defence can highlight the

---

[5] *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*, 392 U.S. 481 (1968), p. 494.

[6] Patricia Hanh Rosochowicz, "Deterrence and the relationship between public and private enforcement of competition law", Amsterdam Centre for Law and Economics Workshop, 2005, p.13; Firat Cengiz, "Passing on Defense and Indirect Purchaser Standing in Actions for Damages against the Violations of Competition Law: what can the EC learn from the US?", CCP Working Paper 07-21, 2007, p.6.

[7] See Foad Hoseinian, "Passing on Damages and Community Antitrust Policy: An Economic Background", World Competition, 2005, p.15; see also Ulf Boge, Konrad Ost, "Up and Running, or Is It? Private Enforcement –The Situation in Germany and Policy Perspectives", 27(4) E.C.L.R., 2006, p.199-200; Kati J. Cseres, "The impact of Consumer Protection on Competition and Competition law: The Case of Deregulated Markets", Amsterdam Center for Law & Economics Working Paper N0.2006-0, p.3-4.

[8] Firat Cengiz, supra note 6, p.7.

[9] As I already discussed, optimal enforcement could be achieved by effective and efficient cooperation

conflict between the compensatory principle and effective deterrence. Denying the passing on defence can produce a strong deterrent effect, as it is claimed to do in the US. However, it may be unjust from a compensatory perspective.[10] Thus, whether the passing on defence is permitted or not is significant and controversial issue.[11]

4.1.4 Problems of Permitting the Passing on Defence

Permitting the passing on defence may cause considerable problems.

Firstly, on the one hand, the passing on defence can render competition litigation fragmented because if the action by the direct purchaser is replaced by actions brought by the indirect purchasers the potential range of persons can be extremely broad and the loss can be split between many private parties, such as consumers.[12] It may put the responsibility for private action in the hands of indirect purchasers, the buyers of a shirt, book or egg who may be unable or unwilling to bring actions for practical reasons such as their small losses and small resources.[13] Indirect purchaser actions can inflate litigation costs and time spent on the litigation of individuals or firms. Legal costs and time can be considerable because of the multiplication of cases. From the perspective of the courts, allowing the passing on defence could be a heavy judicial burden because of an excessive number of cases.

On the other hand, while allowing the passing on defence can decrease the number of potential plaintiffs because it may be uneconomical for indirect purchasers such as consumers to seek to recovery, it may also be uneconomical for

---

between private and public enforcement. Thus, the incentive of plaintiff to bring actions could influence the optimal enforcement.

[10] See Hanover Shoe v United Shoe Machinery Corporation, 392 U.S. 481 (1968)

[11] Edward P. Henneberry, "Private Enforcement in EC Competition Law: The Green Paper on Damages Actions- The Passing-on Defenses and Standing for Indirect Purchasers, Representative Organizations and Other Groups", Heller Ehrman, LLP, 2006, p.3.

[12] Firat Cengiz, supra note 6, pp.6-7; Round Table Discussion on Private Remedies: Passing on defence; Indirect Purchaser Standing ; Definition of Damages: United States, Working Party No.3 on Co-operation and Enforcement, DAF/COMP/WP3/WD(2006)11, p.15.

[13] Philip Haberman, "Quantifying antitrust damages: Flexibility rather than prescription is the best approach", CLI 5 5 (9), 2006, p.4.

direct purchasers because their damages will be reduced by the amount that was passed on down to the next tier.

Secondly, the passing on defence risks causing considerable uncertainty over the level of recovery by individual plaintiffs because of the difficulties of determining and allocating those damages. Irrespective of the case being settled or won, difficulties will arise in determining and distributing damages between the many individuals in a way corresponding to the damage incurred. It may lead to unworkable complexity, and thereby constitute a significant impediment to effective private enforcement.[14]

Thirdly, there is the issue of over-compensation.[15] There is a possibility that direct purchasers will seek damages even if they themselves profit from the anticompetitive infringement. Some direct purchasers may argue that they have suffered loss due to their inability to pass on the overcharge depending on the relative levels of competition in the market even when it is untrue. It is, however, possible that direct purchasers themselves profit from the anticompetitive infringement. For instance, in cartel cases, the direct purchaser could himself profit by claiming for an overcharge he has passed on. Thus, the passing on defence is necessary to avoid a direct purchaser who avoided damage by passing on the overcharge from receiving damages for harm. The defendant should have to pay damages to those who were really harmed by the infringement.[16]

However, the exclusion of the passing on defence does not necessarily result in the over-compensation of the direct purchaser because passed on raised price can result in a reduced volume of sales as the direct purchaser has to raise its prices to its customers. Thus, it must be recognized that there is a possibility that direct purchasers still suffer damage due to a reduction in sales because of raised price even if the overcharge has been transferred to indirect purchasers.[17]

---

[14] Johan Ysewyn, "Private Enforcement of Competition Law in the EU: Trials and Tribulations", International Law Practicum, 2006, p.15.
[15] In respect to unjust enrichment, see section 3.2 which deals with the current situation in respect of the criteria and measurement of damages in the EU, UK, US and Korea.
[16] Commission Staff Working Paper accompanying the White Paper, supra note 1, para 206.
[17] Ibid. at para 202; Jakob Rüggeber and Maarten Pieter Schinkel, "Consolidating Antitrust Damages in Europe: A Proposal for Standing in Line with Efficient Private Enforcement", World Competition, 2006, p.

4.2 The Passing on defence in the US

4.2.1 The *Hanover Shoe* case

The passing on defence in the antitrust area was first addressed in the US in the judgment of the Supreme Court in *Hanover Shoe Inc. v. United Shoe Machinery Corp.*[18] The facts of the case were as follows:

Hanover Shoe case was a follow-on action to an action brought by the DOJ in respect of an infringement of s 2 of the Sherman Act. The plaintiff (*Hanover Shoe)* was a shoe manufacturer. It alleged that the defendant, *United Shoe*, exercised monopoly power over shoe-making equipment because the defendant refused to sell its shoe-making machines and instead required lengthy and restrictive leases, which resulted in a significant overcharge to *Hanover*, the lessee. *United Shoe* raised the passing on defence, arguing that the plaintiff passed on some, if not all, of the overcharges to its customers by raising its prices.

In this case, the issue was whether a defendant found guilty of monopolization under Section 2 of the Sherman Act could defend itself against claims by the direct purchaser of its product by arguing that the direct purchaser passed on the overcharged price to its customers and that therefore the direct purchaser suffered no damage.

The Supreme Court rejected the use of the passing on defence. It held that an antitrust infringer cannot avoid liability to a direct purchaser by showing that the direct purchaser suffered no injury because it passed on any overcharge to its own customers. As a general principle, therefore, defendants are prevented from invoking the passing on defence in respect of sales to direct purchasers under the federal U.S. antitrust laws due to *Hanover Shoe*.

400-401.

[18] *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*, 392 U.S. 481(1968), p. 494.

4.2.2 Rtionale of *Hanover Shoe*

In *Hanover Shoe,* the Supreme Court rejected the passing on defence for two main reasons: i) ensuring effective deterrence and ii) avoiding complexity and uncertainty.

4.2.2.1 Ensuring Effective Deterrence

The Supreme Court rejected the passing on defence to ensure *effective deterrence.* [19] The Supreme Court insisted that permitting the passing on defence could impair the deterrent effect of litigation because ultimate consumers such as the buyers of single pairs of shoes may suffer small and diverse damage and have few legal resources so they rarely have an incentive to bring damages actions.[20] As one commentator has argued, "*Hanover Shoe* has been decided as a pro-plaintiff decision, animated by the twin aims of maximizing deterrence and minimizing the possibility that guilty antitrust infringers could escape liability and retain the fruits of their unlawful activity."[21] It appears that the judgment of the US Supreme Court in *Hanover Shoe*[22] was motivated by the desire to protect potential direct victims by excluding the passing on defence. The Court considered that if competition infringers get off too lightly, the prospect of liability for private damages may not provide infringer with enough incentive to refrain from illegal conduct. The Court's judgment in *Hanover Shoe* rested on the concern that antitrust law will be more effectively enforced by concentrating the full recovery for the overcharging on the direct purchasers rather than by allowing every individual affected by the overcharge to bring actions.[23]

The fear is therefore that those who violate the antitrust laws by price fixing or monopolizing would retain the fruits of their illegality if the defence was allowed because no one would be likely to bring actions against them. Thus, the impact of

---

[19] *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*, 392 U.S. 481 (1968) at 494.
[20] Ibid.
[21] Andrew I. Gavil, "Before the Antitrust Modernization Commission Panel II: State Indirect Purchaser Actions: Proposals for Reform", Federal Trade Commission, Washington, D.C., June, 2005, p. 13.
[22] *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*, 392 U.S. 481(1968), p. 494 .See section 4.2.2 which deals with Rationale of *Hanover Shoe* in the US.
[23] *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*, 392 U.S 481 (1968) at 2070 - 2074.

treble-damage actions, the importance of which the Court many times emphasized, would be substantially reduced by allowing the passing on defence.[24]

Therefore, by rejecting the passing on defence, the Supreme Court tried to ensure effective enforcement.

4.2.2.2 Avoiding complexity and uncertainty

The Supreme Court sought to avoid the complexity and uncertainty of the passing on defence. The judgment was driven by the difficulty of determining what effect a price has on total sales in the real economic world.[25] The impact of the increase in price of any one input on the price of the output is very difficult to determine. One reason for this will be that the input may only represent a fractional influence on the firm's production costs. Calculating the passing on would be insurmountable.[26]

The Supreme Court held:

"We are not impressed with the argument that the sound laws of economics require recognizing this defence. A wide range of factors influence a company's pricing policies. Normally the impact of a single change in the relevant conditions cannot be measured after the fact. Indeed a businessman may be unable to state whether, had one fact been different... he would have chosen a different price. Treble damage actions would require long and complicated proceedings involving massive evidence and complicated theories".[27]

The system of calculating the total overcharge and distributing this between direct purchasers is a much simpler system than calculating overcharges passed on

---

[24] *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*, 392 U.S. 481 (1968) at 494; See section 3.2 which deals with the current situation in respect of the criteria and measurement of damages in the EU, UK, US and Korea.

[25] Sven Norberg, "Some Elements to Enhance Damages Actions for Breach of the Competition Rules in Articles 81 and 82 EC", 32nd Annual International Antitrust Law & Policy Conference, Fordham, New York, 2005, p.12.

[26] Philip Haberman, supra note 13, p.1.

[27] *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*, 392 U.S. 481 (1968) at 492-493

to indirect purchasers. In this case, the Supreme Court also stressed that federal courts were ill-equipped to engage in tracing overcharges through a supply chain, and that any attempt to do so would yield unreliable results. Therefore, the Supreme Court prohibited the passing on defence in order to prevent both unduly long and complicated antitrust cases.

4.2.3 The Implications of the Position of US law on the Passing on Defence

Given the above rationales, the Supreme Court's decision was motivated by the ensuring effective deterrence and avoiding complexity and uncertainty by permitting only direct purchaser actions. As a result of *Hanover Shoe* decision, US direct purchasers are able to recover damages to the entire amount of any overcharge rather than their actual loss. The defendant's overcharges multiplied by the quantity of the product purchased can be obtainable irrespective of the question whether or to what extent the plaintiffs passed on the overcharge. The Supreme Court, however, did not base its conclusion on reasoning of what could be fairness or justice which means real victims must have compensation. On the contrary the outcome was rather directed by the *difficulties in calculating* the amount of what had actually been passed on.[28] US law comes down in favour of rapid and attractive damages actions for direct purchasers and against the concept of passing on defence, even though although permitting passing on defence may lead to a more just distribution of the damages.

4.3 The Passing on defence in Korea

4.3.1 The Current Situation of Passing on defence in Korea

In Korea, there has been much talk about stimulating private enforcement in the area of competition law. In this respect it needs to be determined whether the passing on defence is allowed or not because of the argument, discussed above, that the defence can promote the incentives of potential plaintiffs by influencing the

[28] Sven Norberg, supra note 25, p.12.

amount of damages they receive. However, the availability of the passing on defence in competition law has not been yet established and there are as yet no precedents in the case law.

The important question for Korea is whether it is desirable to follow the rule laid down by the US Supreme Court in *Hanover Shoe*,[29] discussed above in section 4.2.2, in order to ensure deterrence of anticompetitive conduct as well as compensation for damage. It can be argued that to ensure effective private enforcement, it is desirable to prohibit the passing on defence as US law does, because direct purchasers are more likely to detect anticompetitive conduct and have more incentive to bring actions. The US position on the passing on defence is looked at with interest for comparative purposes by Korea.

4.3.2 Rationale of Permitting Passing on defence

It is submitted that the exclusion of the passing on defence is not compatible with fundamental Korean legal principles because of three main reasons.

4.3.2.1 The Principles of Full Compensation and Sufficient and Adequate Causation

It must be noted that compensation for anticompetitive damage requires the combination of *the principle of full compensation*[30] and a *sufficient and adequate causation.*[31] The main questions are exactly what are *needed* for full compensation and what comprises sufficient and adequate causation.

For full compensation, plaintiffs have to be able to obtain compensation for actual damage (*damnum emergens*). In quantification of damage, it is desirable to ensure that capital loss such as inflation does not reduce the value of

---

[29] Hanover Shoe v United Shoe Machinery Corporation, 392 U.S. 481 (1968).
[30] In respect to full compensation, see section 3.2.1 which deals with full compensation in Korea.; Kwac Yun-Gik, "General Principles of Obligations Law", Parkyoungsa, 2005, pp. 106-126.
[31] Kwac Yun-Gik, Ibid., pp. 110-116 ; Gi Won- Lim, "Lecture on Civil Law"(5th ed), Hongmunsa, 2007, p.920-930; Song Deok-Soo, "New Lecture on Civil Law"(3rd ed.), Parkyoungsa, 2010, .pp. 946-952

compensation.[32] To ensure full compensation, as I discussed in Chapter III, Korean Civil Procedure Law allows interest for the period between the occurrence of the specific damage and the judgment ordering compensation.[33] The award of interest has been also declared essential by the Supreme Court as an element of full compensation.

The Supreme Court stated that :

" The normal rule is that damages are assessed at the date of loss and not at the date of judgment. Interest will compensate the plaintiff for the passage of time between the time when he suffered his loss and the time when he gets judgment in respect of it." [34]

A causal link is one of the elements of civil liability. In order to impose liability it is not sufficient merely to have an infringement and damage occurring. It is necessary to prove also a causal link between the infringement and the damage, namely that the damage was caused by that infringement. Under Civil law, private plaintiffs can recover damages only if they manage to prove an infringement and *sufficient and adequate* casual relationship between infringement and damage.[35] This provision of the Civil law is applied to damages actions under competition law. As far as damages actions are concerned, the provision of damages actions of Civil law is fundamental to other laws such as competition law. Thus, there must be a *relevant causal link* between the breach of the competition rules and the damage sustained by the injured parties. Sufficient and adequate causation is generally used to help distinguish between cases where liability should or should not be incurred rather than having any concrete and identifiable content such as exclusion of liability in the presence of intervening events.[36] For instance, if cartelists fixed the price of product and after this price-fixing the price of this product is higher than the competitive price, sufficient and adequate causation between this cartel and the

---

[32] Supreme Court, 26. 5.1987, 86DACA1876

[33] Civil Procedure Law 109, See section 3.2.1 which deals with the current situation in respect of the criteria and measurement of damages in Korea.

[34] Supreme Court, 21.10.1966, 64DA1102; Supreme Court, 27. 7.1975, 74DA1393.

[35] Civil Law 750

[36] Kwac Yun-Gik, supra note 30, p. 112; Gi Won- Lim, supra note 31, pp.920-921; Song Deok-Soo, supra note 31, pp. 946-947

damage appears when consumers buy this product and are damaged.

4.3.2.2 The Principle of Compensatory Damages

As already discussed in Chapter III, Korea favours the compensatory principle in damages actions.[37] The generally accepted principle of damages actions is that damage is compensatory and plaintiffs can only recover the actual loss.[38] So, if, as a result of a cartel, direct purchasers are able to pass on the higher price to indirect purchasers such as consumers, they cannot recover the difference between the competitive market price and the monopolized market price as damages because they have not suffered the whole loss. Thus, recognition of the passing on defence is compatible with the compensatory principle of damages actions.

Furthermore, an exclusion of the passing on defence could in effect give damages actions a 'punitive' function detached from a compensatory function. This does not correspond to Korean civil law principles. As I have already discussed in chapter III,[39] in Korea, there is no justification for the introduction of punitive damages. Therefore, prohibiting the passing on defence is inconsistent with the principles of Korean law.

4.3.2.3 The Prohibtion of Over-compensation

As I have already discussed, the prohibition of over-compensation is a basic principle of Korean Law.[40] In the case of a cartel the true injury is the difference between the economic profits of the purchasers under a regime of competitive

---

[37] See chapter 3 which deals with damages; Kwac Yun Gik, supra note 30, p.108; .Kim Hyung-Bae, "General Principles of Obligations Law", Parkyoungsa, 1999, p. 237

[38] Actual loss is to be assessed net of any loss that the victim of the infringement has taken from the anticompetitive conduct; Supreme Court, (14. 6.1962) Judgment 4294; Supreme Court, (25. 11.1969) Judgment 69 DA887; Kwac Yun Gik, supra note 30, p.108; Kim Hyung-Bae, supra note 37, p. 237; Gi Won-Lim, supra note 31, pp.911, 913 ; Song Deok-Soo, supra note 31, pp. 942, 943

[39] See section 3.2.1 which deals with the current situation in respect of the criteria and measurement of damages in Korea.

[40] See section 3.2.1 which deals with the current situation in respect of the criteria and measurement of damages in Korea.

suppliers and under the cartelized suppliers. The compensation should provide for the only equitable restitution[41] that the victims would have had in the absence of the anticompetitive conduct.

As I have already noted, the exclusion of the passing-on defence may serve a great deterrent effect for parties contemplating engagement in anticompetitive infringements because of the amount of liability they would face, as the defendants in *Hanover Shoe* did.[42] However, it could also be described as 'unjust' because there is the probability that direct purchasers that had raised its prices and passed them on to indirect purchasers such as consumers could be unjustly enriched *at the expense of* those indirect purchasers' interests.

If the passing on defence is denied, even if indirect purchasers can bring damages actions for the whole loss they initially suffered, the direct purchaser may, at least partially, be unjustly enriched. Korean principles demand that the direct purchaser who has passed on an excessive price in whole or in part must be unable to recover either on the grounds that no damage has been sustained applying a traditional 'but for' approach or as regards any restitutionary remedies. The *but for approach* is the situation in the absence of the anticompetitive practice. The *but for price* is calculated by taking the difference between the price which the plaintiff paid because of the anticompetitive practice and the price that would have been paid in the absence of anticompetitive practice, multiplied by the volume purchased. The measure of damages is also determined by the length of time the plaintiff remained in the anti-competitive market.

Therefore, it is submitted that the passing on defence should be recognized to prevent over-compensation by direct purchasers.[43]

---

[41] According to Prof. Kwack, compensatory damage covers the difference between what the injured has and what he(or she) would have had but for illegal behaviour. Kwac Yun-Gik, supra note 30, p.106

[42] See section 4.2 which deals with the passing on defence in the US.

[43] Unjust enrichment would occur if direct purchasers both (i) recouped the excessive prices they had paid by charging their customers similarly inflated prices and (ii) were awarded damages on the basis that they had suffered injury as a result of the unlawfully inflated prices. See section 3.2 which deals with unjust enrichment in the EU, UK, US and Korea.

4.3.2.4 The Problem of Multiple Liabilities

If the passing on defence were not to be allowed and indirect purchasers were entitled to bring actions in addition to direct purchasers who had suffered loss, there would be the risk of a multiplicity of damages actions arising out of a single anticompetitive conduct. The prospect of multiple liabilities could arise if all injured parties including direct and indirect purchasers were entitled to compensation without allowing passing on defence.[44] If the passing on defence is not permitted, it is arguable that it necessitates the denial of standing to indirect purchasers, as is the case in the US, in order to avoid the prospect of multiple damages awards.

However, it is important to bear in mind the Korean Competition Law 56, which states that: "Anyone who has damage of anticompetitive behaviour can be compensated for the damage." [45]

According to the Korean Competition Law 56, therefore, anyone who has suffered loss has the right to compensation in damages. 'Anyone' must include indirect purchasers such as consumers as well as direct purchasers such as distributors or wholesalers. The Korean Civil Law also states that one who causes damage is obliged to compensate for the damage that arises through his action. It does not define any categories of persons entitled to damage.[46] The Korean Civil Law states:

"If a natural or legal person intentionally or out of neglect infringes the prohibitions in Civil Act, he or she shall compensate the damage thereby occurring".[47]

---

[44] Kim Gu-Nyeon, "A Study on Problems on Private Remedies for Damages of Korean Antitrust Law", 14 Comparative Private Law 261, 2007, p. 277

[45] Competition Act 56. This is an official translation by the Korea Fair Trade Commission.

[46] Civil Act 750(Damages actions). Civil law is important in competition damages actions because the general principle of damages actions under Civil law is also applied to competition damages actions. In korean civil procedure, the person who asserts to be injured by the defendent has standing in damage action. Lee Shi-Yoon, " New Civil Procedure Law", Parkyoungsa, 2005, p.128; Hoh Moon-Hyuck, "Civil Procedure Law", Bubmoonsa, 2006, p.185; Song Sang-Hyun & Park Ik-Hwan, "Civil Procedure Law", Parkyoungsa, 2008, p. 133

[47] This is an official translation by the Korean Government. The prescription period for raising a compensation action has been extended from five to ten years from when the damage occurred. It is also always possible to raise any such claim before the District courts.

In the competition field, it can be argued that it is difficult to show actual damage occurring to indirect purchasers because of small and dispersed damage. To mitigate this difficulty, the 'Guideline of Anticompetitive Conduct' of the KFTC [48] reduces or even reverses liability of proof of causality. According to 'Guideline of Anticompetitive Conduct' of the KFTC, causality could be presumed as long as damage has been proven, in which case it is the defendant who has to prove that the damage was not caused by its conduct. Given the Guideline, it appears that in Korea claims by indirect purchasers for compensation are not to be denied on account of the difficulties they present. Thus, it is desirable to recognize passing on defence to avoid multiple liabilities.

Given the above principles in the Competition Law and the Civil Law, it must be concluded that a person who causes damage must compensate for it and that anyone who suffers from anticompetitive practices must be able to obtain compensation. It follows from this that Korea has to allow indirect purchaser actions. Moreover, it would be wrong to allow indirect purchaser actions while excluding the passing on defence because it would give rise to the problem of multiple recoveries.[49]

Multiple liabilities refers to a situation where the defendant is condemned to pay the direct and indirect buyers the same amount, although the direct buyer has previously passed on the overcharge to the latter.[50] For example, if the overcharge is £10, then multiple liabilities arise if both the direct and indirect purchaser is compensated for £10 each. This occurs because, by excluding the passing-on defence, the defendant would not be able to limit liability by showing that the direct purchaser mitigated the loss by passing on the overcharge to downstream buyers. In this case, condemning the defendant twice is not desirable, since it results in an over-compensation to the direct buyer. However, such a situation can be avoided through procedural mechanisms that apportion compensation between the parties.

---

[48] Guideline of Anticompetitive Conduct of the KFTC 26, 2005.5.22.iii.1.Ga.(3)
[49] Kim Gu-Nyeon, supra note 44, p. 277
[50] Harris and Sullivan, supra note 3, pp. 343-345. The authors defined the first situation as 'duplicative liability'. In the US, this was perceived as a serious risk because of the 'treble damage' rule.

Avoiding multiple liabilities by combining the principles of, *Hanover Shoe* and *Illinois Brick*[51] is not accepted in Korea. Excluding the passing on defence and refusing standing to indirect purchasers infringes both the principle against unjust enrichment (ie. over compensation) and the principle that compensation for harm should be obtainable from the person causing the damage. It is submitted, therefore, that if both direct and indirect purchasers are allowed to bring damages actions against the infringer for competition damages, the passing on defence must be recognized.

4.4 The Passing on defence in the EU

4.4.1 Overview of the Passing on defence in the EU

Until now there have been no specific or clear principles regarding the passing-on defence in EU law in respect of competition cases. It has left these matters largely to the national laws.[52] However, the Commission is now considering the harmonisation of national laws on this matter, as seen in its Green Paper of 2005[53] and subsequent White Paper of 2008.[54]

It should be noted, moreover, that the ECJ has dealt with this defence in the context of levied charges that infringed Community law.[55] The ECJ has established that such a defence is compatible with EC rules which the national rules must comply.[56]

---

[51] *Illinois Brick Co. v. State of Illinois* 431 U.S. 720 (1977). See section 5.2 which deals with indirect purchaser litigation in the US.
[52] Firat Cengiz, supra note 6, p.32.
[53] European Commission, "Green Paper - Damages Actions for Breach of the EC Antitrust Rules," COM (2005) 672 final.
[54] European Commission, "White Paper on Damages actions for Breach of the EC antitrust rules", COM (2008) 165 final.
[55] Hans Just I/S v Danish Ministry for Fiscal Affairs , Case 68/79, [1980] ECR 501.
[56] Carlo Petrucci, "The Issues of the Passing on Defence and Indirect Purchasers' Standing in European Competition Law", E.C.L.R., 29(1), 2008, p.39-40.

4.4.2. Rationale of Permitting Passing on defence in the EU

4.4.2.1 Principle of Effectiveness

The ECJ has laid down the principle of effectiveness[57] and the ECJ recalled this principle in the leading cases of *Courage v Crehan*[58]and *Manfredi.* [59]

In *Courage v Crehan*, the ECJ held that:

"in the absence of Community rules governing the matter, [it] is for the legal system of each Member State to designate the courts and tribunals having jurisdiction and to lay down the detailed procedural rules governing actions for safeguarding rights which individuals derive directly form Community law provided ..... that they do not render practically impossible or excessively difficult the exercise of rights conferred by Community law (principle of effectiveness)". [60]

The rejection of the passing on defence may be seen as running contrary to the effective deterrent principle. The passing on defence could efficiently increase the deterrent effect on potential competition infringers because it would give greater incentives for plaintiffs such as consumers to bring actions. It can be argued that the more parties bring actions, the more companies try to avoid illegal conduct afraid of facing damages actions.

However, it can also be argued, as seen above when discussing the position in the US and Korea, that allowing the passing-on defence would collide with the principle of effectiveness of EC law because allowing the passing on defence could incur the considerable practical difficulties of the determination, calculation and distribution of damage between direct and indirect victims.[61] Effective enforcement

---

[57] See section 3.2.2 which deals with the principle of effectiveness; See, for example, *Hans Just I/S v Danish Ministry for Fiscal Affairs*, Case 68/79,[1980] ECR501;[1981]2CMLR714; *Amministrazione delle Finanze dello Stato v SpA San Georgio, Case 199/82,* [1983]ECR3595;[1985]2CMLR658.

[58] *Courage v Crehan*, C-452/99, [2001] ECR I-6297.

[59] *Manfredi v. LIoyd Adriatico Assicurazioni SpA*, C-295/04, [2006] ECJ, 348.

[60] *Courage v Crehan*, C-452/99, [2001] ECR I-6297 at para. 29.

[61] See section 4.2 which deals with the passing on defence in the US and section 4.3 which deals with passing on defence in Korea; see also Riley, A, "EC Antitrust Modernisation: The Commission does very

would thus be reduced. Prohibiting the passing on defence, on the other hand, would correspond more closely to the principle of effectiveness because paying full damages to the direct victim is simpler than distributing damages between direct and indirect victims. [62] Those in favour of excluding the passing on defence refer to the consideration of practical difficulties of quantification and distribution of damage. The exclusion of the passing on defence, it is argued, could make litigation a more attractive option for potential plaintiffs such as direct purchasers who have motives and resources to bring actions. Therefore, it is necessary to compare the effectiveness both when the passing on defence is allowed and when it is not.

In its White Paper the Commission recalls the Court's emphasis on the compensatory principle and its premise that damages should be available to any person who can show a sufficient causal link with the infringement in White Paper. The White Paper makes the suggestion that infringers should be allowed to invoke the possibility that the overcharge might have been passed on.[63] It suggests that the defendant in an antitrust damages case should be entitled to rely on the passing-on defence against a claim for compensation of the overcharge, brought by a plaintiff who is not a final consumer.[64] It also makes a suggestion as to how to alleviate the burden of proof on indirect purchasers. It suggests that indirect purchasers should be able to rely on the rebuttable presumption that the illegal overcharge was passed on to them in its entirety.[65]

It should be noted that the European Parliament has stated in its Resolution on the White Paper that it:

"[n]otes that developing a common Community approach to passing on has merit and approves the admissibility of passing on as a defence and evidence for such a defence must always be provided."[66]

---

nicely – thank you! Part 2: Between the Idea and the Reality: Decentralisation under Regulation", 1 European Competition Law Review 657, 2003, p. 670.

[62] John Pheasant, "Private Damages Actions: Response to the Commission's green paper", CLI 5 8(8), 2006, p.2.

[63] White Paper on Damages actions, supra note 54, para 2.6.

[64] Ibid.

[65] Ibid.

[66] European Parliament resolution of 26 March 2009 on the White Paper on damages actions for breach of the EC antitrust rules (2008/2154(INI)), para 18.

The attitude of the European Parliament is very important given that any adoption of EU harmonisation measures would involve a Directive, the legislative procedure for which would never the participation of the Parliament.

4.4.2.2 The Principle of Prohibiting Unjust enrichment

As I have already discussed in Chapter III, Community law allows the national laws of the Member States to prohibit unjust enrichment if they wish.[67] This is clear from the *Crehan* and *Manfredi* cases, as I will discuss below. It is also clearly stated in the Commission Staff Working Paper accompanying the White Paper on Damages actions.[68] There is therefore a strong likelihood that EC law will not preclude the operation of the passing on defence in national laws based on the principle of prohibiting unjust enrichment.

In the non-competition law case, *San Giorgio*, the ECJ recognized the principle that EC law does not prevent national law from taking into account the fact that unlawful charges are passed on to other buyers, thus preventing the recovery of such charges.[69] The Court confirmed this principle in *Crehan.* The Court stated that:

"Community law does not prevent national courts from taking steps to ensure that the protection of the rights guaranteed by the Community law does not entail the unjust enrichment of those who enjoy them."[70]

Later, the Court repeated the same formula in *Manfredi*.[71] The Court stated that:

"It is settled case-law that Community law does not prevent national courts from taking steps to ensure that the protection of the rights guaranteed by

---

[67] See Chapter 3.2.3 which deals with the current situation in respect of the criteria and measurement of damages in the EU.
[68] Commission Staff Working Paper accompanying the White Paper, supra note 1, para. 191.
[69] Amministrazione delle Finanze dello Stato v San Giorgio SpA, Case 199/82, [1983] ECR 3595,at 13.
[70] *Courage Ltd* v *Bernard Crehan*, C-453/99,ECR [2001] I-6297 at 30.
[71] Vincenzo Manfredi v Lloyd Adriatico Assicurazioni SpA, C-295/04, [2006] ECR I-06619, at 94.

Community law does not entail the unjust enrichment of those who enjoy them." [72]

In respect to the relationship between passing on defence and unjust enrichment, it has been said by one commentator that:

"Matters of unjust enrichment and passing-on defence are essentially similar in terms of their underlying rationales. They both stem from the fairness consideration. .....The only practical difference is that analysis of passing-on proves much more complicated than analysis of unjust enrichment as it involves technical economic and econometric data. That difference aside, it is not hard to imagine that the Court's position would not be dramatically different in the matter of passing-on defense from its position regarding unjust enrichment".[73]

It should be noted that the ECJ has, in several cases under Article 288(2) regarding the non-contractual liability of the Community institutions, recognized a passing on defence to avoid unjust enrichment.

For example, in *Dumortier Frères* maize gritz producers brought damages actions against the Community because certain refunds to which they were entitled had been abolished. In this case, the ECJ held that:

"If the loss from the abolition of the refunds has actually been passed on the prices the damage may not be measured by reference to the refunds not paid. In that case, the price increase by the producers would take the place of the refunds, thus compensating the producer".[74]

Under the principle of prohibition of over-compensation, a direct purchaser who has passed on an excessive charge will be unable to recover. There have been a number of Article 234 references in actions for the recovery of illegally levied

---

[72] *Manfredi v. Lloyd Adriatico Assicurazioni SpA*, C-295/04, [2006] ECJ, 348 at para. 94. This case confirmed what Advocate General van Gerven had argued in Case C-128/92, *Banks* v. *British Coal,* [1994] ECR I-1209 at para 48 of his Opinion; See also *Ireks-Arkady v Council and Commission, Case 238-78,* [1979] ECR 2955 at para.14; See also, *Michaïlidis AE v. Idryma Koinonikon Asfaliseon (IKA)*, Joined Cases C-441/98 and C-442/98, [2000] ECR I-7145,at para. 31.

[73] Firat Cengiz, supra note 6, p.32.

[74] *Dumortier Frères v. Council*, Case 64 and 113/76, [1979] ECR 3091 at para. 15.

duties brought by undertakings against Member States, such as *Just,*[75] *San Giorgio,*[76] *Bianco,*[77] *Comateb*[78] and *Mikhailidis.*[79] In these cases, the ECJ has accepted the defendants' (Member States) ability to invoke the passing on defence based on the principle of prohibition of over-compensation.

In *Just* , the ECJ held that:

"It should be specified in this connection that the protection of rights guaranteed in the matter by Community law does not require an order for the recovery of charges improperly made to be granted in conditions which would involve the unjust enrichment of those entitled. There is nothing, therefore, from the point of view of Community law, to prevent national courts from taking account in accordance with their national law of the fact that it has been possible for chargers unduly levied to be incorporated in the prices of the undertaking liable for the charge and to be passed on to the purchasers..." [80]

In the *Weber's Wine World* case,[81] the ECJ also ruled that it was not incompatible with Community law for Denmark to apply its national principle of unjust enrichment where the unlawful charges had been passed on.[82]

In *Banks,*[83] a competition case, AG van Gerven dealt with the issue of quantification as well as that of the avoidance of unjust enrichment:

"In quantifying the damage it is necessary, in any event, in accordance with the aforesaid prohibition on unjust enrichment to take account of the extent to

---

[75] *Hans Jus t v. Danish Ministry for Fiscal Affairs*, Case 68/79, [1980] ECR 501.
[76] *Amministrazione delle Finanze dello Stato v. (SpA) San Giorgio*, Case 199/82,[1983] ECR 3595.
[77] *SA Les Fils de Jules Bianco and J. Girard Fils SA v. Directeur Général des Douanes et droits indirects*, Joined Cases 331/85, 376/85 ,[1988] ECR 1099.
[78] *Société Comateb*, Joined Cases C-192/95 to C-218/95, [1997] ECR I -165.
[79] *Mikhailidis v. Asphaliseon* (IKA), Joined Cases C-441/98 and 442/98 , [2000] ECR I- 7145, para 31.
[80] *Hans Just I/S v Danish Ministry for Fiscal Affairs*, Case 68/79,[1980] ECR501;[1981]2CMLR714, para. 26; See also *Amministrazione delle Finanze dello Stato v SpA San Georgio*, Case 199/82, [1983] ECR3595;[1985]2CMLR658, para 13.
[81] *Weber's Wine World and Others v. Abgabenberufungskommission Wien*, C-147/01, [2003] ECR I-11365.
[82] *Weber's Wine World and Others v. Abgabenberufungskommission Wien*, C-147/01, [2003] ECR I-11365, para. 101, 102
[83] *Banks* v. *British Coal,* C-128/92, [1994] ECR I-1209.

which the damage has been passed on in the selling prices of the complainant undertaking". [84]

However, Community law does not allow a Member State to resist claims for reimbursement simply where the burden of a tax has been passed on. The ECJ has considered damages for lost profits due to reduced sales caused by overcharged price.[85] In *Weber's Wine World* the Court treated passed on damage and actual enrichment as cumulative conditions, which both have to be fulfilled in order for any reduction in repayment to a trader of an unduly claimed charge. In this case, the Court made judgment to preclude national legislation or a national administrative practice which makes the exercise of the rights conferred by the Community legal order impossible in practice or excessively difficult by establishing a presumption of unjust enrichment on the sole ground that the duty was passed on to third parties.[86]

For example, with reference to *Just*, the Court pointed out that:

"The trader may have suffered damage as a result of the very fact that he has passed on the charge levied by the administration in breach of Community law, because the increase in price of the product brought about by passing on a charge has led to a decrease of sales... In such circumstances the trader may justly claim that... the inclusion of that charge in the cost price has caused him damage which excludes, in whole or in part, any unjust enrichment which would otherwise be caused by reimbursement".[87]

In *Comateb,*[88] the ECJ re-affirmed that the plaintiff's harm also consists of a loss of sales deriving from charging higher prices. In these cases, the Court thus made it clear that there is a distinction between, on the one hand, the extent to which there may be passed on damage and, on the other hand, the damage suffered

---

[84] See AG van GERVEN, Opinion of Case C-128/92, *Banks* v. *British Coal,* [1994] ECR I-1209 at para. 51.
[85] *Société Comateb*, Joined cases C-192/95 to C-218/95, [1997] ECR I -165, CJ. at para. 26.
[86] See generally, *Weber's Wine World and others v. Abgabenberufungskommission Wien*, C-147/01,[2003] ECR I- 11365
[87] *Société Comateb*, Joined cases C-192/95 to C-218/95,[1997] ECR I -165, para 31,32
[88] *Société Comateb*, Joined cases C-192/95 to C-218/95,[1997] ECR I -165

as a result of reduced sales.

In *Weber*, the Court also affirmed such rulings as EU consolidated case law. In this case, the ECJ ruled on the question of whether an Austrian retailer could recover state taxes, which were collected in infringement of EC law.[89] The Austrian authority argued that the retailer could not recover these taxes because it had passed them on to its customers. The ECJ accepted this defence in principle, but recognized the possibility that the retailer lost business as a result of charging higher prices.

In *Weber's Wine World*, the Court held

"It must therefore be concluded on this point that the rules of Community law on the recovery of sums levied but not due are to be interpreted as meaning that they preclude national rules which refuse repayment of a charge incompatible with Community law on the sole ground that the charge was passed on to third parties, without requiring that the degree of unjust enrichment that repayment of the charges would entail for the trader be established"[90]

There is no persuasiveness in the idea that defendants should be exempt from liability and unjustly enriched merely in order to avoid a possible unjust enrichment in the direct victim's assets.

In *Weber's Wine World*,[91] Advocate General Jacobs also stated that:

"However, even where the burden of the charge has been passed on in whole or in part, repayment to the trader of the relevant amount does not necessarily entail his over-compensation."

---

[89] *Weber's Wine World and others v. Abgabenberufungskommission Wien*, C-147/01, [2003] ECR I-11365 at para. 119.
[90] *Weber's Wine World and others v. Abgabenberufungskommission Wien*, C-147/01,[2003] ECR I -11365 at paras. 102 and 117.
[91] *Weber's Wine World and others v. Abgabenberufungskommission Wien*, C-147/01,[2003] ECR I- 11365, para 47.

After the ECJ's judgment in *Weber*, therefore, there is an unjust enrichment defence which requires both proof of passed on damage and proof of no reduction in sales or other reduction in income.[92]

It is submitted that in respect of the need for uniform, consistent and effective remedies, the existing EC case law on the passing on defence, although not directly on the point of private enforcement of competition law, may be extended without excessive difficulty to that area because EC law has developed clear principles in the areas of damages liability and causation. For consistency and legal certainty, it is desirable that EC law adopts the same or a similar approach towards the passing on defence in dealing with damages actions in competition cases as in other areas of law. Most importantly, to avoid unjust enrichment the European Commission suggests recognizing the passing on defence the White Paper.[93]

Given the above judgements of the ECJ, the principle of prohibition of unjust enrichment could play a decisive role in damages actions in respect of the position of the passing on defence in competition cases. It has been persuasively argued that there is a high probability that the passing on defence could be available because of this principle.[94] Given the principles of effectiveness and the disapproval of unjust enrichment, it appears improbable that the EU would adopt the position of US law under *Hanover Shoe*. Under EC law a direct purchaser who has passed on an excessive price in whole or in part should be unable to recover on the grounds that there has been unjust enrichment at the expense of the party that has been passed on.

If a plaintiff has suffered as the result of a competition law infringement, the defendant should compensate plaintiffs for the damage because they are real victims. However, it is also necessary to allow the defendant to invoke the passing on defence in order to reduce the amount to what the plaintiff really suffered. To the extent that the plaintiff does not suffer the entire actual loss resulting from the illegal increase in price, he should not be able to entirely recover the illegal price

---

[92] John, "Private damages actions: part 2", CLI 5 3 (6), 2006, p. 4.
[93] White Paper on Damages actions, supra note 54, para 2.6.
[94] See, Brealey "Adopt Perma Life, but follow Hanover Shoe to Illinois? – Who Can Sue for Damages for Breach of EC Competition Law?", 1 Competition Law Journal 127, 2002; John Pheasant, "Private Damages Actions", CLI 5 2 (6), 2006, p.4; Carlo Petrucci, supra note 56, p.40.

increase imposed upon him. To ensure corrective justice for real victims of anticompetitive conduct, it is submitted that the passing on defence must be recognized in EU law. If defendants show by factual and/or expert evidence that such passing on occurred in practice, it should constitute a complete or partial defence to the claim.

4.5 The Passing on defence in the UK

4.5.1 Current Position of the Passing on Defence in the UK

As explained above the ECJ has not yet given any definitive guidance on the passing on defence in the area of competition law.[95] Therefore, the passing on defence is still a matter for law of Member States of the EU.

The CAT noted the significance of the existence or exclusion of the passing on defence to future private enforcement in *BCL Old Co v Aventis.* [96] In this case, the CAT referred to the passing on defence as a "novel and important issue both in this case and in future cases" and noted that "these issues are as yet undecided in the United Kingdom nor, as far as we know, definitively decided in any other European jurisdiction". [97]

In *BCL*, the damages actions arose out of the Commission's decision on a long-standing vitamins cartel in November 2001. [98] In this case, upstream and downstream passing on issues arose.

---

[95] See section 4.4 which discriminates passing on defence in the EU from the UK.
[96] BCL Old Co v Aventis and Deans Foods v Roche Products Ltd, [2005] CAT 2
[97] BCL Old Co v Aventis and Deans Foods v Roche Products Ltd, [2005] CAT 2, paras 32-34.
[98] In the 1990s, vitamin manufacturers including Aventis (then known as Rhône-Poulenc), BASF, and Hoffmann-LaRoche, were pursued in the US and the EU because of price-fixing and market-sharing cartels. The European Commission found that 13 manufacturers of vitamins supplying the European Economic Area (EEA) participated in a series of continuing agreements contrary to Article 81(1)of the EC Treaty and Article 53(1) of the Agreement on the European Economic Area 1992: Commission Decision in Case COMP/E-1/37.512, *Vitamins* [2003] O.J. L6/1.The fines against Hoffmann-LaRoche were the highest ever imposed by the U.S. DOJ (U.S. $500 million) and the European Commission fined it £462 million (including a reduction under the Leniency programme). Some of Hoffmann-LaRoche's customers brought actions for damages and since the time for appealing against the EC Commission's decision under Article 230 EC to the Court of First Instance had expired and no appeal had been lodged by the defendants the infringement decision of the EC Commission bound the CAT. Some of Hoffmann-LaRoche's customers brought actions for damages.

The claims were brought against two addressees of the *Vitamins* decision, Aventis SA[99] and F Hoffmann-La Roche AG, and a UK subsidiary of each of them. The defendants were manufacturers or distributors of a wide range of vitamins. The plaintiffs stated that they carried on business throughout the time during when the vitamins cartel was in operation. The plaintiffs reared poultry for the supply of chicken meat and eggs to supermarkets and wholesalers. Each of the plaintiffs stated that it bought vitamins for incorporation in poultry feedstuffs in order to rear poultry, from one of the defendants directly or from nutrition companies which had themselves purchased vitamins from the defendants.

The plaintiffs claimed that the defendants caused each of the plaintiffs to pay higher prices than competitive prices because of defendants' cartel. They also claimed that the power of supermarkets in the market for poultry meat prevented plaintiffs from passing on their increased costs caused by the vitamins cartel. The claims were advanced on the basis that the plaintiffs were seeking compensation for loss suffered as a result of higher vitamin prices resulting from the cartel. The plaintiffs claimed damages from the defendants pursuant to section 47A of the Competition Act 1998. These claims had the added complexity of requiring the plaintiffs to prove that third parties such as the nutrition companies had passed on higher prices, so-called upstream passing on.

With regard to this argument, the defendants replied that not all increases in prices were always passed on in full or in part by the nutrition companies to the plaintiffs (upstream pass on) and that the plaintiffs were not precluded from passing on any increased costs from inflated prices in the form of higher prices to their own customers (downstream pass on). Thus, the plaintiffs needed to prove that they did not pass on increased costs they had incurred to their customers, the large supermarket chains, but absorbed those costs themselves.[100]

In this case, the CAT suggested that the claims, pleaded on the normal compensatory basis, might possibly be alternatively pleaded in restitution.[101]

---

[99] Now Sanofi-Aventis SA.
[100] *BCL Old Co Limited and others v. Aventis SA and. Others*, Case No 1028/5/7/04, [2005]CAT 2, para 9
[101] *BCL Old Co Limited and others v. Aventis SA and. Others*,Case No 1028/5/7/04,[2005]CAT 2, para 28

Applications to amendment to plead restitution and exemplary damages were made. The CAT also raised the question whether the plaintiffs were, as a matter of law, required to prove no downstream passing on. In the end the case was settled without these issues ever having to be resolved.[102]

From the statements of the CAT in this case, it is submitted that the CAT did in effect recognize the passing on defence.

Although it can be argued that a competition claim should be categorised as lying in restitution, the Court of Appeal in *Devenish Nutrition Limited v. Sanofi-Aventis SA (France) &ORS*, a further episode in the litigation arising from the *Vitamins* cartel, was not prepared to make that finding.[103] On the contrary, it appears from this case that because of the nature of compensatory damages, where the defendant can show that the plaintiff has avoided or mitigated its loss by passing on loss, the defendant may be able to claim a reduction in the damages. The Court of Appeal said:

"No one suggests that, to the extent that the plaintiff has in fact suffered a loss because it has paid too high a price which it has been unable (for any reason) to pass on to its own purchasers, that loss cannot be recovered. If, however, the plaintiff has in fact passed the excessive price on to its purchasers and not absorbed the excess price itself, there is no very obvious reason why the profit made by the defendants (albeit undeserved and wrongful) should be transferred to the plaintiff without the plaintiff being obliged to transfer it down the line to those who have actually suffered the loss. Neither the law of restitution nor the law of damages is in the business of transferring monetary gains from one undeserving recipient to another undeserving recipient even if the former has acted illegally while the latter has not."[104]

In this case, whilst the matter was not directly addressed, both the High Court

---

[102] *BCL Old Co Limited and others v. Aventis SA and. Others*,Case No 1028/5/7/04,[2005]CAT 2

[103] *Devenish Nutrition Limited v. Sanofi-Aventis SA(France) and otherS*, Case A3/2008/0080, [2008]EWCA Civ 1086, paras 16, 21. See also section 3.2.3 which deals with the current situation in respect of the criteria and measurement of damages in the UK.

[104] Ibid., para 147.

and the Court of Appeal therefore proceeded on the basis that the passing on defence is available as a matter of English law. [105]

Another case in which an English court has made highly significant comments on the passing on defence is *Emerald Supplies Ltd & Anr v. British Airways* Plc, where the High Court stated that:

"The judgment of the US Supreme Court in *Hanover Shoe* was a policy a decision not open to the courts in England." [106]

Here the court identifies the principle in *Hanover Shoe* as being one of policy. That brings up the whole question of having a principle which sacrifices 'fairness' or 'justice' to other imperatives. As I already discussed,[107] in the *Hanover Shoe* case, the US Supreme Court sacrificed 'fairness' to ensure efficiency by rejecting passing on defence.

The OFT also supports the concept of the passing on defence in principle. However, it has expressed concern that it might allow defendants to escape liability and accordingly proposed that the burden of proof should be on the defendant to show that any overcharge had been passed on.[108]

4.5.2 Rationale of Permitting Passing on defence

There are four main reasons which militate in favour of the UK courts accepting the passing on defence.[109]

Firstly, the exclusion of the passing on defence would contradict the fundamental principles applied by the UK courts in making damages awards.[110]

---

[105] Ibid.
[106] *Emerald Supplies Ltd v. British Airways Plc*, IHC 46/09, [2009] EWHC 741(Ch), at para 37.
[107] See section 4.2.2 which deals with rationale of Hanover Shoe case.
[108] The Office of Fair Trading, "Private Actions in Competition Law: Effective Redress for Consumes and Business", OFT916, 2007, pp.38-39.
[109] Tim Ward and Kassie Smith, "Competition litigation in the UK", 2005, Thomson, p. 273, 7-049.
[110] See section 3.2.3 which deals with the current situation in respect of the criteria and measurement of damages in UK; Greg Olsen, supra note 2, p. 3.

Whether the passing on defence should be recognized depends on whether private damages actions exist to provide a *strong deterrent effect* or *real redress for harmed parties*. Rationales of permitting the passing on defence rely mainly on the *compensatory principle* and the *principle of justice or fairness*. As I already discussed in Chapter 3,[111] it is clear that the primary object of an award of damages in the UK is to compensate the plaintiff for damage done to him for *actual loss*.

Therefore, exclusion of the passing on defence would conflict with established principles of compensation on which damages are usually awarded in the UK.

As I have seen in Chapter 3[112] the UK could adopt exemplary ((punitive) damages to ensure a deterrent effect. However, while exemplary (punitive) damages are known in UK law, the UK courts have only recognized a punitive element in exceptional circumstances.[113] This is particularly so where the payment of such will not result in the over-compensation of a plaintiff.

Secondly, if the passing on defence were to be excluded in the UK, as it has been in the US, it would contradict the principles of the prohibition of over-compensation. In the UK, it is noted that in the *BCL* case, Sir Christopher Bellamy QC, President of the CAT, questioned whether:

"claims arising from infringement of the 1998 Competition Act, or of Community Law are strictly speaking in the nature of damages in a way analogous to an action for tort or whether they can be looked at in some other way, for example, as some kind of claim that could perhaps go under the general heading of 'unjust enrichment'...." [114]

---

[111] See section 3.2.3 which deals with the current situation in respect of the criteria and measurement of damages in the UK.
[112] See section 3.2.3 which deals with the current situation in respect of the criteria and measurement of damages in the UK
[113] Rookes v Barnard [1964] AC 1129; R v Secretary of State for Transport, ex p Factortame [1997] Eu LR 475, QBD; Kuddus v Chief Constable of Leicestershire Constabulary [2001] UKHL 29;[2001]2WLR1789
[114] BCL Old Co v Aventis and Deans Foods v Roche Products Ltd, Cases 1028/5/7/04&1029/5/7.04.

Arguably, the primary justification for the recognition of the passing on defence is to prevent the over-compensation of the plaintiff.[115] In *Devenish*, as seen above, the Court stated that the plaintiff (ie plaintiff) was entitled to be compensated for any loss it has suffered as a result of the cartel, no more and no less.[116] However, although the OFT recommends recognizing the passing on defence, it takes the view that as a matter of policy, it is appropriate to place the burden of proof of passed on damages in respect of establishing a passing on defence with the defendant but, where established, that the defendant should not be liable for loss which has been passed on in whole or in part.[117]

Thirdly, there is the high probability of multiple liabilities. To enhance the deterrent effect, the promotion of direct purchasers at the expense of indirect purchasers can lead to the ban on indirect purchaser actions as in the US. [118] That approach might appear to be in conflict with the compensation principle articulated by the ECJ because anyone who suffers a loss caused by anticompetitive conduct can bring damages actions before a court.[119] If indirect purchaser actions are allowed, it is necessary to recognize passing on defence to avoid multiple liabilities. To prevent multiple liabilities, as I already discussed above, prohibition of the passing on defence and recognition of indirect purchaser actions would not be acceptable as a matter of UK law.[120]

Fourthly, the passing on defence has been recognised in other areas of British law, in particular in relation to taxation. Where the state has imposed an unlawful tax on a person the courts have allowed the tax authorities to recognize the passing on defence in the face of claims for repayment.[121] For example, the passing on defence has already been successfully applied by HM Customs & Excise to deny

---

[115] *Courage v Crehan*, C-452/99, [2001]ECR I-6297 at para. 30.
[116] *Devenish Nutrition Limited v. Sanofi-Aventis SA(France) and others*, Case A3/2008/0080, [2008]EWCA Civ 1086, para 161.
[117] OFT 916, supra note 108, p.40; See also Lesley Farrell and Sarah Ince, "UK: Private Enforcement", European Antitrust Review, 2009, p.5.
[118] See the *Illinois Brick* case, discussed in section 5.2 which deals with indirect purchaser litigation in the US.
[119] *Courage v Crehan*, C-452/99, [2001]ECR I-6297, discussed below in section 4.4.2; Ward and Smith, supra note 109, p. 278, 7-058.
[120] *Devenish Nutrition Limited v. Sanofi-Aventis SA(France) and others*, Case A3/2008/0080, [2008]EWCA Civ 1086, paras 114 and 160.
[121] Greg Olsen, supra note 2, p.5.

the repayment of overcharged VAT to plaintiffs who have passed on the amount of the overcharge to their customers. In *Marks & Spencer v Customs and Excise*, while the Court of Appeal recognised that the defence is not an easy one because of a large number of variables, it suggested that the matter was not so complex that the passing on defence could not be allowed.[122]

There could still be some question about permitting the passing on defence in the competition law area because it can be argued that tax cases are significantly different from competition cases. However, it is submitted that the fundamental principle of competition damages actions is not different from the fundamental principle of tort damages actions. The fundamental principle of tort damages actions could be applied to competition damages actions. Furthermore, as I already mentioned, in the competition field, it seems from the *Devenish* case that the courts will recognize the passing on defence.[123]

Therefore, it is submitted that there is the uncertainty whether the passing on defence is recognized or not, however, there is a high probability that the passing on defence could be allowed in the UK such as in in *Devenish* case.[124]

It seems likely, however, that a UK court would not apply a passing on defence without making a reference to the ECJ under Article 234 raising the compatibility of such a rule with the Community principle of effectiveness. In *BCL*, the CAT noted that "those questions in relation to passing on are not only relevant to actions in the UK. Courts in other EU jurisdictions may also be interested in how this CAT decides that issue."[125] It has also been suggested that there is, furthermore, a probability that any decision in the UK would be followed by the other Member States of the EU since the UK may emerge as the forum of choice for private competition law proceedings.[126]

---

[122] *Marks and Spencer Plc v. commissioners of Customs and Excise*, [1999] EWCA Civ 3024, paras 77-82

[123] *Devenish Nutrition Limited v. Sanofi-Aventis SA(France) and others*, Case A3/2008/0080, [2008]EWCA Civ 1086, para147.

[124] Ibid.

[125] BCL Old Co Limited and others v Aventis and others, Case No 1028/5/7/04 , at para. 33.

[126] Alison Jones and Brenda Sufrin, "EC Competition Law", 3rd ed., Oxford, 2007, p.1344-1345.

4.6 Conclusion on the application of the passing on defence in Korea

The US Supreme Court's decision on the passing on defence in *Hanover Shoe* is based on ensuring effective and efficient private competition enforcement. The US Supreme Court considered that if competition infringers get off too easily, the prospect of liability for private damages may not provide infringer with enough incentive to refrain form illegal conduct.

Given the tension between taking the best action to deter anticompetitive conduct by excluding the passing on defence (as was the motive for the *Hanover Shoe* ruling) and having rules which prevent over-compensation, the important question is whether Korea needs to follow the US approach in order to ensure effective and efficient private competition enforcement. If Korea follows the US, Korea would have to modify its usual approach to competition damages awards. Prohibiting the passing on defence will represent a significant exception to the Korean traditional legal principle.

In considering whether to make such an exception, it is necessary to recognize the difference between the Korean legal system and US legal system. The Korean legal system is totally different from the US legal system. The competition enforcement mechanism has been privatised in the US. As Whish points out, it is worth noting that over 90% of all antitrust cases in the US involve private rather than public action.[127] The US system has the main objective of making private enforcement as attractive as possible, both in terms of the potential recovery and the speed and ease of the procedure. [128]

From the perspective of general Korean Civil law, however, prohibition of the passing on defence is incompatible with the principle of damages actions because payments for damages should provide for equitable compensation for what

---

[127] Clifford A. Jones, "Private Enforcement of Antitrust Law in the EU, UK and USA", Oxford, 1999, p.199-200.

[128] Brian Kennelly, "The Defence of "Passing On", Bar European Group Annual Conference", Cyprus, 2005, p. 9; See, W. van Gerven, "Substantive Remedies for the Private Enforcement of EC Antitrust Rules before national Courts, in : European Competition Law Annulal 2001-Effective Private Enforcement of EC Antitrust Law, ed. By Ehermann/Atanasiu, 2003, p. 53-93, 74-75.

the victims would have had in the absence of the anticompetitive conduct. The damage suffered by the direct customers due to the payment of overcharged price has ultimately not resulted in any pecuniary losses if the direct purchaser passed on the overcharge to the next economic level. The payment for damages should not provide direct purchasers with over-compensation. If the direct purchaser is allowed to claim the amount of the overcharged price without any deductions for the extra revenues that he has got from his own customers by raising the prices that he was charging them, he get over-compensation. Purchasers of an overcharged product or service who have been able to pass on that overcharge to their own customers should therefore not be entitled to compensation of that overcharge. The defendant should be able to invoke the passing on defence in order to mitigate the damages claim brought by the direct purchaser. Furthermore, allowing direct purchasers actions whereas prohibiting passing on defence could cause multiple liabilities.

However, the passing on of the overcharge may well have led to a reduction in the plaintiff's sales. Such loss of profits should obviously be compensated by the one who is responsible for the initial overcharge. Thus, the passing-on defence should be allowed to the defendant in cases only where the damage has been passed on and has not resulted in the plaintiff suffering a decline in sales which ultimately led to a loss of profit in comparison to the situation in the absence of the infringement. Thus, it is necessary to consider if passing on defence could decrease plaintiff's sales.

If reduction in the plaintiff's sales is considered, given above five reasons such as i) full compensation and adequate and sufficient causation, ii) compensatory principle of damages actions, iii) prohibition of over-compensation, iv) prohibition of multiple compensations and v) need to recognize difference between Korean legal system and US legal system, it is submitted that Korea should not adopt the US rule of restricting the passing on defence but instead retain both the passing on defence and offence.

Most of all, it is crucially important that "the passing on defence has no

relation to the plaintiff's entitlement to compensation of harm suffered."[129] The passing on defence may be seen less a defence in the strict sense and more as a part of the exercise of quantification of damage. Allocation of the overcharge is not a question of liability, but quantification of damage. While recognition of the passing on defence would involve a measure of complexity, there is considerable doubt that it would lead to insurmountable difficulties in the handling of private proceedings. As I already discussed,[130] to minimize the difficulties of quantification of damage, under Article 57 of the Competition Law, in case it is difficult to verify the amount of damages, the court may confirm the substantial amount of damages by virtue of its authority.[131]

While a certain level of complexity is necessary in determining the total overcharge of the anticompetitive activity, if the passing on defence is allowed, it does magnify the complexity at every stage of the supply chain, as shown in *Hanover Shoe*. However, it has been pointed out that *Hanover Shoe* was decided in 1968, at a time when the current tools of sophisticated economic analysis were not available to plaintiffs. [132] The considerable practical difficulties of the determination, calculation and distribution of damage between direct and indirect purchasers could be solved with the more sophisticated techniques now than in1968. In respect to the difficulty of proving passed on damage, it is submitted that Korea should consider adopting the type of presumption that the EC Commission suggests in the White Paper.

Korea should not follow *Hanover Shoe*[133] to deny passing on defence. Therefore, it is submitted that under Korean competition and civil rules, a direct purchaser who has passed on an excessive price in whole or in part should remain unable to recover the loss in whole or in part either on the grounds that no damage has been sustained applying a traditional 'but for' approach. If the defendant succeeds in proving the passing on defence, the indirect purchaser may have a good

---

[129] Commission Staff Working Paper accompanying the White Paper, supra note 1, p.58.
[130] See section 3.2.1 which deals with the current situation in respect of the measurement of damages in Korea.
[131] It is a reference to the Competition Act 57 which I set out in the above paragraph.
[132] Greg Olsen, supra note 2, p.4.
[133] Hanover Shoe v United Shoe Machinery Corporation, 392 U.S. 481 (1968).

argument in his action against the him as he may then no longer be in a position to plead that the damage has not been passed on to the indirect purchaser.

Chapter 5. Indirect Purchaser Litigation

5.1 Overview of Indirect Purchaser Litigation

Competition infringements may give rise to both direct and indirect damage. The negative effects of anticompetitive practices could have a direct or indirect impact on all intermediary or final consumers in the production-distribution chain. For example, a price-fixing agreement among products results in downstream purchasers such as indirect purchasers paying an overcharged price which is the difference between the competitive price in the absence of an anticompetitive agreement and the price where there is an anticompetitive agreement.

If damage is caused by the anticompetitive practice, the question is 'who can recover?' in whole or part. The key question is whether all parties including indirect purchasers in a chain of distribution may bring actions to recover damages from the infringer with whom they have no direct contractual relationship, based on the proportion of the overcharge that has been passed on by the direct purchaser.

The question of the standing of indirect purchasers is an important and controversial one and is likely to have a major influence on the development of private competition enforcement because of its effects on potential plaintiffs.[1] In this Chapter I examine whether it is desirable for Korea to recognize indirect purchaser actions in the light of the position on indirect purchaser litigation in the EU, UK and US.

5.1.1 What is an Indirect Purchaser Litigation?

An indirect purchaser action is where a party forced to pay the passed on overcharge seeks to recover losses from the party responsible for the original

[1] Edward P. Henneberry, "Private Enforcement in EC Competition Law: The Green Paper on Damages Actions- The Passing-on Defenses and Standing for Indirect Purchasers, Representative Organizations and Other Groups", Heller Ehrman, LLP, 2006, p.3.

overcharge. Depending on a number of economic variables, a direct purchaser may or may not be able to pass on all or some of the illegal overcharge to the next indirect purchaser in the chain such as the retailer or consumer.[2]

In respect to indirect purchaser litigation, a basic issue is the breadth of the definition of 'indirect purchaser'. How far should indirect purchaser rights of action be extended? Should the right of action be limited to indirect purchasers of only the actual product that is the subject of the anticompetitive activity? Or should it include purchasers of derivative products, for example, other products containing the overcharged product as an ingredient?[3] If 'indirect purchaser' includes derivative purchasers, it is necessary to consider what constitutes a derivative product.

For instance, if central processing unit (hereafter, CPU) manufacturers fix the price of the CPU, there are a variety of indirect purchasers. Firstly, purchasers of the CPU not from the manufacturers but from intermediaries such as wholesalers can be indirect purchasers of a product. Secondly, purchasers (retail dealers) of computer on which the CPU has been mounted by the manufacturers who bought the CPU as a component can be indirect purchasers of a derivative product. Thirdly, consumers who buy computer at higher prices due to the overcharges on the CPU in retail store can be also indirect purchasers of a derivative product.

Should all these indirect purchasers of derivative products have standing to bring damages actions against the CPU price-fixers? If all indirect purchasers of derivative products have the right to bring damages actions against the infringer, the complications of private actions could impair efficiency. However, if derivative purchasers are not recognized, it would impair fair and just compensation.[4] If the primary objective of private actions is compensation,[5] it is submitted that it is necessary to recognize these derivative purchasers because usually the obvious

---

[2] European Commission, "Commission Staff Working Paper accompanying the White Paper on Damages actions for breach of the EC antitrust rules", SEC (2008) 404, 2008 at para 27.
[3] See Andrew I. Gavil, "Antitrust Remedy Wars Episode I: Illinois Brick from inside the Supreme Court", 79(3) Saint John's Law Review 553, 2005, p.565-566.
[4] In respect to full compensation, see section 3.2.1 which deals with the current situation in respect of the criteria and measurement of damages in Korea.
[5] See section 1.2.3 which deals with the objectives of private competition enforcement.

victims of anticompetitive conduct are, direct and indirect purchasers such as consumers of derivative products.[6]

Given what is said above about derivative purchasers, an indirect purchaser could be defined as a purchaser who has no direct dealings with the infringer but who nonetheless may have suffered harm because an illegal overcharge was passed on to him along the distribution chain. Moreover there could be also some 'side-effect' victims who cannot choose effectively among competitive products due to cartelists' artificially high price. There is a high possibility that those would-be purchasers could not buy the affected product or service because the price was too high as a result of the overcharge.[7]

5.1.2 The Tensions between Fairness and Efficiency

Issues of indirect purchaser standing and the passing on defence[8] raise certain tensions between the elements of *fairness* and *efficiency*. It can be argued that if all indirect purchaser actions are recognized, it can impair efficient and effective private enforcement because of the difficulty of bringing damages actions. These difficulties are caused in part by the complexity of calculation and distribution of damage. Indirect purchaser litigation has the potential to become unmanageable and extremely expensive because of these difficulties.

For instance, as I discuss below,[9] in order to ensure efficiency, the US Supreme Court rejected every prior federal Court of Appeals decision on the subject and denied a federal antitrust remedy to millions of indirect purchasers, such as consumers, in *Illinois Brick.* [10]

---

[6] Foad Hoseinian, "Passing on Damages and Community Antitrust Policy: An Economic Background", World Competition, 2005, p.24.
[7] Luke R. Tolaini and Anna M. Morfey, "Antitrust Damages Actions in Europe: A Step in the U.S. Direction?", 22-SUM Antitrust 93, 2008, p.94; Patricia Hanh Rosochowicz, "Deterrence and the relationship between public and private enforcement of competition law", Amsterdam Centre for Law and Economics Workshop, 2005, p.13.
[8] In respect to the passing on defence see Chapter 4.
[9] See section 5.2.3 which deals with rationale of decision of *Illinois Brick.*
[10] *Illinois Brick Co. v. State of Illinois* 431 U.S. 720 (1977). See also these cases which were rejecting indirect purchaser actions. South Carolina Council of *Milk Producers, Inc. v. Newton*, 360 F.2d 414 (4th Cir. 1966); *Midway Enter., Inc. v. Petroleum Mktg. Corp.*, 375 F. Supp. 1339, 1344-45 (D. Md. 1974); *Southern Gen. Builders, Inc. v. Maule Indus. Inc.*, 1973-1 Trade Cas. (CCH) ¶ 74,484 at 94,152 (S.D. Fla.

However, it can be argued that, in the name of efficiency, the *Illinois Brick* decision has substantially impaired fair justice by denying compensation to indirect purchasers who are the real victims of anticompetitive conduct.[11] Fairness requires that every individual, including final consumers, should be entitled to claim damages in order to make good any injury they have incurred as a result of illegal conduct.[12] Fairness therefore requires recognition of both indirect and direct purchaser standing (and also the passing-on defence as discussed in Chapter IV) to avoid unjust enrichment eg. over-compensation) so that each plaintiff can receive compensation for the amount of damage they suffered.

Furthermore, if indirect purchaser actions are not permitted, there is a possibility of unjust enrichment since the direct purchasers could have passed on the overcharged price to indirect purchasers.[13] Whereas, the real victims such as indirect purchasers could not obtain any compensation.[14] Any right of action for compensatory damage should ideally be shaped to ensure a remedy for indirect purchasers such as consumers in order to avoid the danger of significant injustice and ensure fairness and justice through compensating real victim damages.

Above all, permitting compensation for only the direct purchasers leads to sub-optimal compensation because direct purchasers' litigation goals, strategies and incentives may not necessarily align with those of indirect purchasers.[15] It

---

1972); *Iowa v. Union Asphalt & Roadoils, Inc.*, 281 F. Supp. 391 (S.D. Iowa 1968), aff'd, 409 F.2d 1239 (8th Cir. 1969); *Mangano v. American Radiator and Standard Sanitary Corp.* 438 F.2d 1187 (3d Cir. 1971) (per curiam). In this case, the third Circuit upheld dismissal of an antitrust action based on plaintiffs' failure to answer interrogatories and, alternatively, plaintiffs' failure to "show that these overcharges became components of the prices they paid." However, the third Circuit recognized plaintiffs' right to recover if they could prove pass-on.

[11] Prior to *Illinois Brick*, indirect purchasers were plaintiffs in almost two-thirds of all private federal antitrust actions. S. Rep. No. 95-934, 95th Cong., 2d Sess., 1978, p.19-20; Greg Olsen, "Actions for damages are Compensation and deterrence? The passing on defence and the future direction of UK private proceedings", CLI 4.8(3), 2005, p.2; Andrew I. Gavil, supra note 3, p.565-566.

[12] Firat Cengiz, "Passing on Defence and Indirect Purchaser Standing in Actions for Damages against the Violations of Competition Law: what can the EC learn from the US"?,CCP Working Paper 07-21, 2007, p.8; Edward P. Henneberry, supra note 1, p.4.

[13] See section 4.3.2.3 which deals with probability of unjust enrichment in the US if passing on defence is not allowed.

[14] See Donald I. Baker, "25Years Later: Walking in the Footsteps of Brunswick, Illinois Brick, and Sylvania Cover Story: Federalism and Futility: Hitting the Potholes on the Illinois Brick Road", 17-FALL Antitrust 14, 2002, p.17; John Pheasant, "Private Damages Actions: Response to the Commission's green paper", CLI 5 8(8), 2006, p.3.

[15] Andrew I. Gavil, "Before the Antitrust Modernization Commission Panel II: State Indirect Purchaser Actions: Proposals for Reform", FTC, Washington, D.C., 2005, p.17-19.

represents the only direct purchasers' interests not all of victims. Repairing their relationship with their suppliers and securing more favourable future terms may be more important to them than compensating indirect purchaser damages caused by anticompetitive practice.[16]

5.1.3 The Relationship between the Passing on defence and Indirect Purchaser actions

As I have already mentioned above in 5.1.2., the questions of the indirect victim's right to bring an action and the admissibility of the passing on defence are interrelated.[17] If a passing on defence is allowed then this will affect the right of indirect purchasers to bring damages actions for prevention of multiple liabilities.[18] Therefore, any answer to the question of whether to permit passing on defence can influence the number of potential plaintiffs in indirect purchaser actions.[19]

For example, as I have already discussed in Chapter 4, the judgment of the US Supreme Court in *Hanover Shoe*[20] protected direct purchasers by excluding the passing on defence. In that case, there was a possibility of unjust enrichment if the direct purchasers could obtain substantial damages even if they passed on the overcharged damage to indirect purchasers.[21] However, *Hanover Shoe* did not address the issue of whether indirect purchasers who were harmed by an antitrust conduct passed on by a direct purchaser could maintain an antitrust damages action against the infringer. The answer was given in 1977 when the ruling in *Illinois*

---

[16] Edward A. Snyder, "Efficient Assignment of Rights to Sue for Antitrust Damages", 28(2) Journal of Law and Economics 469, 1985, p.470-471.

[17] See section 4.2 which deals with passing on defence in the US; see also Assimakis P Komninos, "EC Private Antitrust Enforcement: Decentralised Application of EC Competition Law by National Courts", Hart Publishing, 2008, p.202; Kati J. Cseres, "The impact of Consumer Protection on Competition and Competition law: The Case of Deregulated Markets", Amsterdam Center for Law & Economics Working Paper N0.2006-0, p.5-6; Andrew I. Gavil, supra note 3, p.565-566; Ulf Boge, Konrad Ost, "Up and Running, or Is It? Private Enforcement –The Situation in Germany and Policy Perspectives", 27(4) ECLR, 2006, p.201.

[18] In respect to multiple liabilities, see section 4.3.2 which deals with rationale of permitting passing on defence in Korea.

[19] See Edward P. Henneberry, supra note 1, p.4.

[20] *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*, 392 U.S. 481 (1968) p.494; See the section 4.2.2.1 which deals with Rationale of *Hanover Shoe* in the US.

[21] See section 4.3.2.3 which deals with probability of unjust enrichment in the US if passing on defence is not allowed.

Brick, discussed below in section 5.2, was delivered.[22]

Given that the passing on defence is controversial, as discussed in Chapter 4,[23] it is unsurprising that the issue of indirect purchaser action is also controversial. The *Illinois Brick* case[24] in the US is crucial and illuminates certain issues that other jurisdictions should take into account.[25] Therefore, in this chapter, first, I consider the position of indirect purchaser litigation in the US and then discuss such litigation in respect of Korea, the EU and the UK before concluding what is the optimal position for Korea to take in the future.

5.2 Indirect Purchaser Litigation in the US

5.2.1 Overview of Indirect Purchaser Litigation in the US

The substantive question is whether indirect purchasers should be permitted to bring actions under Section 4 of the Clayton Act to redress damage as a consequence of overcharges passed-on to them from direct purchasers. The Clayton Act does not contain any restrictions on standing to bring actions. The Clayton Act gives standing to "any person who is injured in his business or property by reason of anything forbidden by the antitrust laws".[26]

'Any person' has been interpreted broadly to include individuals, partnerships, corporations and associations.[27] The Supreme Court has noted that "the Clayton Act is comprehensive in its terms and coverage, protecting all who are

---

[22] *Illinois Brick Co. v. State of Illinois* 431 U.S. 720 (1977) The Court viewed this issue as intertwined with the question it had faced nearly a decade earlier in *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*, 392 U.S. 481 (1968). That case presented the question whether a defendant who had already been found guilty of an antitrust infringement (monopolization in that case) should be permitted to defend a subsequent private treble damage action by arguing that the direct purchaser suffered no injury because it passed on its damages to firms further down the chain of distribution.

[23] See section 4.1.4 which deals with problems of permitting passing on defence.

[24] Illinois Brick Co. v. State of Illinois, 431 U.S. 720 (1977).

[25] Carlo Petrucci, "The Issues of the Passing on Defence and Indirect Purchasers' Standing in European Competition Law", E.C.L.R., 29(1), 2008, p.35.

[26] The Clayton Act of 1914, 15 U.S.C. §15.

[27] OECD Directorate for Financial and Enterprise Affairs Competition Committee, "Roundtable Discussion on Private Remedies: Passing on Defence; Indirect Purchaser Standing; Definition of Damages of United States", DAF/COMP/WP3/WD (2006)11, p.2.

made victims of the forbidden practices by whomever they may be perpetrated."[28] It has also stated that "Congress used the phrase *any person* intending it to have its naturally broad and inclusive meaning."[29] Almost anyone can bring actions as a *person* for the purposes of section 4.[30] Corporations and associations are included in the definition of *person* or *persons* as used in the Clayton Act.[31] States, municipalities, and foreign nations are also deemed to be *persons* within the meaning of the Act.[32]

The wording of Clayton Act, Section 4 (a) does not make it very clear if there are any limitations to standing that could prevent indirect purchasers from bringing damages actions. Standing limitations have, however, been developed by the Supreme Court in *Illinois Brick*. The Supreme Court has tried to set limits on the extent of treble damage liability in *Illinois Brick* case[33] by limiting the kinds of harms that can be compensated under Section 4 of the Clayton Act. Standing requirements in the US are generally stricter than in most of Member States of the EU and Korea because of the decision of *Illinois Brick*.[34]

5.2.2. Introduction to *Illinois Brick*

In *Illinois Brick*, the Supreme Court addressed the issue of whether indirect purchasers that have suffered damage passed on by the direct purchasers can bring actions against the infringer to recover the portion of the overcharge they paid. The fact of *Illinois Brick* was as follows.

The State of Illinois brought damages actions against Illinois Brick Company

---

[28] *Mandeville Islands Farms, inc. v. American Crystal Sugar Co.*, 334 U.S. 219, 236(1948)
[29] *Pfizer, Inc. v. Government of India*, 434 U.S. 308, 312 (1978); Gerber, D. J., "American law in a time of global interdependence: U.S. national reports to the XVIth International Congress of Comparative Law: Section III Competition Law", 50 American Journal of Comparative Law 263, 2002, p.276.
[30] *Pfizer, Inc. v. Government of India,* 434 U.S. 308, 312 (1978).
[31] "The word 'person' or 'persons' . . . shall be deemed to include corporations and associations." 15 U.S.C. § 12(a) (1976).
[32] *Pfizer, Inc. v. Government of India*, 434 U.S. 308 (1978) (foreign nations are *persons*); *Hawaii v. Standard Oil Co.*, 405 U.S. 251 (1972) (states are *persons*); *Georgia v. Evans*, 316 U.S. 159 (1942) (states are *persons*); *Chattanooga Foundry & Pipe Works v. City of Atlanta*, 203 U.S. 390 (1906) (municipalities are *persons*).
[33] *Illinois Brick Co. v. State of Illinois* 431 U.S. 720 (1977) at 720.
[34] *Illinois Brick Co. v. State of Illinois* 431 U.S.720 (1977) at 720.

who fixed the price of concrete blocks. *Illinois Brick* was a follow-on action to Department of Justice (hereafter, DOJ) civil and criminal proceedings against Illinois Brick and a group of its rivals. The State of Illinois was therefore a consumer of buildings which incorporated concrete blocks that had been purchased at overcharged prices. The State of Illinois was an indirect purchaser of the concrete blocks. There were more than two intervening purchasers between the defendants and the State of Illinois, and neither of the intervening purchasers was alleged to be part of the conspiracy. Illinois Brick argued that indirect purchasers should not be permitted to bring damages actions under federal antitrust laws. It argued that, as *Hanover Shoe* disallowed the use of a passing on defence[35], the law should be symmetrical and forbid indirect purchasers to use passing on *offensively*.[36]

In this case, the Supreme Court accepted the claim of the defendants. It denied the right of indirect purchasers to whom unlawful overcharges had been passed on to bring actions under federal antitrust laws. The Supreme Court held that downstream purchasers are not entitled to recover damage suffered as a result of an infringement of federal antitrust law.

For example, if computer monitor manufacturers entered into a cartel to fix the price of computer monitor sold on computers, only the computer manufacturers, who purchased the price-fixed computer monitor from manufactures, would be allowed to bring damages actions. Wholesaler, retail computer dealers, or consumers would not be compensated because they are *indirect purchasers*.

It is submitted that the Supreme Court's decisions of *Illinois Brick* was intended to provide something of a trade-off between the interests of direct and indirect purchasers, as further explained below. The Supreme Court, however, sacrificed indirect purchasers' interests to direct purchasers' interests.

---

[35] See section 4.2.1 which deals with overview of *Hanover Shoe* case.
[36] *Illinois Brick Co. v. State of Illinois* 431 U.S. 720 (1977) at 728-729.

5.2.3 Rationale of Decision of *Illinois Brick*

There were four major reasons for the Supreme Court's decision to prohibit indirect purchasers' actions.

5.2.3.1 Ensuring Effective Compensation and Strong Deterrence

The Supreme Court prohibited indirect purchaser actions to ensure *effective compensation* and *strong deterrence*.

In respect to compensation, the Court assumed that permitting indirect purchaser damages actions could dilute the compensation of direct purchasers and diminish the incentives of direct purchasers to bring actions.[37] It stated that it is desirable to bar indirect purchasers' damages actions and to concentrate all compensation in the hands of direct purchasers.[38] According to the judgment, compensation would be served well by concentrating recovery in direct purchaser's hands because "the direct purchaser absorbs at least some and often most of any overcharges."[39] The Supreme Court thus showed little concern about the right for compensation of real victim such as indirect purchasers who suffer the harm passed by direct purchasers.

In respect to deterrence, the Supreme Court rejected the view that deterrence would be best served by permitting indirect purchasers to bring actions.[40] Permitting indirect purchasers actions could diminish deterrent effect since indirect purchasers such as consumers would probably have insufficient incentive to bring actions because of their small and dispersed damage.[41] By concentrating the right of action in the hands of direct purchasers, the Court believed it would maximize

---

[37] *Illinois Brick Co. v. State of Illinois* 431 U.S. 720 (1977) at 737-738.
[38] *Illinois Brick Co. v. State of Illinois* 431 U.S. 720 (1977) at 746.
[39] *Illinois Brick Co. v. State of Illinois* 431 U.S. 720(1977) at 746
[40] *Illinois Brick Co. v. State of Illinois* , 431 U.S. 720(1977) at 746.
[41] Citing Brief for the USA as Amicus Curiae at 20 n.14, *Illinois Brick Co. v. State of Illinois* 431 U.S. 720(1977) at 720 (No. 76-404)), at 3; Bobtail Bench Memo from Gene Comey, Justice Powell's Clerk, to Lewis F. Powell, Jr., Associate Justice, US Supreme Court, *Illinois Brick Co. v. Illinois* (No. 76-404) (Mar. 23, 1977) at 5.

direct purchasers' incentives to bring actions and thus enhance the deterrent impact of their efforts.[42]

In an article written shortly after the judgment, Landes and Posner also emphasize the deterrent impact of the direct purchasers' actions. They state that:

"The most important consideration from the standpoint of deterrence is not who receives the proceeds of any judgment levied against the antitrust violator, but that there are adequate incentives to bring suit and prosecute it to judgment."[43]

Landes and Posner argue that deterrence can be gained by limiting indirect purchasers' remedies even if windfalls of damages to direct purchasers result. They stress that direct purchasers typically have superior information on the effects of any antitrust conduct of their suppliers, which also enhances deterrence. For instance, in a cartel case, direct purchasers could be best placed to have information that an infringement may have taken place.[44] Thus, deterrence would be served well by concentrating recovery in direct purchaser's hands.[45]

Based on the above reasons, the US Supreme Court concluded that nothing would be lost to either compensation or deterrence if indirect purchasers were entirely deprived of any federal antitrust right of action. Hence, the Court placed all rights to compensation and role for deterrence on *direct purchasers' actions*.

However, in *Illinois Brick* the minority in the Supreme Court criticized the Illinois Brick judgment. In this case, Mr. Justice Brennan, with whom Mr. Justice Marshall and Mr. Justice Blackmun joined, insisted that the majority decision which affords a remedy only to persons who purchase directly from an antitrust

---

[42] *Illinois Brick Co. v. State of Illinois* 431 U.S. 720 (1977), at 746; OECD directorate for Financial and Enterprise Affairs Competition Committee, "Round Table Discussion on Private Remedies: Passing on Defence; Indirect Purchaser Standing; Definition of Damages: United States", Working Party No.3 on Co-operation and Enforcement, DAF/COMP/WP3/WD (2006)11, p.17.

[43] W.M. Landes and R.A. Posner, "Should indirect Purchasers Have Standing to Sue Under the Antitrust Laws? An Economic Analysis of the Rule of *Illinois Brick*", 46 U.Chi.L.Rev.,1979, p.608.

[44] See Michael Harker and Morten Hviid, "Competition Law Enforcement and Incentives for Revelation of Private Information", World Competition 31(2), 2008, p.291.

[45] W.M. Landes and R.A. Posner, supra note 43, pp. 609, 611; See also Edward A. Snyder, supra note 16, p. 470.

infringer is a regrettable retreat since real victims such as indirect purchasers could not have compensation. They also insisted that Section 4 of Clayton Act was clearly intended to operate to protect individual consumers who purchase through middlemen.[46]

5.2.3.2 Ensuring the Efficiency of Private Enforcement

It is also argued that the Supreme Court denied indirect purchasers' standing to bring actions because it approached the matter of private enforcement almost exclusively from the perspective of efficiency.[47] The Court therefore assured the maximisation of effective private enforcement action through encouraging direct purchasers to bring actions. As I already discussed,[48] the Court's concern in *Hanover Shoe* was to enforce the antitrust law effectively by concentrating the full recovery for the overcharging in the direct purchasers rather than by allowing every victim such as indirect purchasers to bring actions.[49]

According to the judgment of *Illinois Brick*, permitting indirect purchaser actions would result in inefficient enforcement of the antitrust laws because the considerable difficulties of tracing the effects of overcharges through successions of sale-resale transactions.[50] In *Illinois,* the Court pointed out that tracing everyone who is damaged by antitrust conduct and calculating the extent of individualized damages in all submarkets would require courts to perform multiple, long and complicated analyses involving a large number of interested parties, which would impair efficiency.[51] It reasoned that:

"permitting the use of pass-on theories essentially would transform treble-damages actions into massive efforts to apportion the recovery among all potential

---

[46] *Illinois Brick Co. v. State of Illinois* 431 U.S. 720 (1977) at 746-747.
[47] W.M. Landes and R.A. Posner, supra note 43, pp.608-609; Firat Cengiz, supra note 12, p.24; Brian Kennelly, "The Defence of 'Passing On'", Bar European Group Annual Conference, Cyprus, 2005, p.9
[48] See section 4.2.2 which deals with rationale of *Hanover Shoe*:
[49] *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*, 392 U.S 481 (1968) at 2070 - 2074.
[50] *Illinois Brick Co. v. State of Illinois*, 431 U.S. 720(1977) at 726.
[51] *Illinois Brick Co. v. State of Illinois,* 431 U.S. 720(1977) at 726; In respect to calculation of indirect purchaser's damages, see generally, "Margaret M. Zwisler, "State Indirect Purchaser Litigation and U.S. Antitrust Enforcement, Latham &Watkins LLP, 2005.

plaintiffs that could have absorbed part of the overcharge ...."[52]

The Supreme Court said that allowing such indirect claims would add whole new dimensions of complexity to treble-damages actions and seriously undermine their effectiveness. The Supreme Court also considered that the complexities and uncertainties involved in the defensive use of passing on against a direct purchaser are multiplied in the offensive use of passing on by a plaintiff.[53] The complexities of dealing with indirect purchaser claims could pose a significant challenge for litigants, experts and the courts.

Furthermore, in *Illinois Brick*, the Supreme Court stressed that federal courts were ill-equipped to engage in tracing overcharges through a supply chain. In the Court's view, apportioning damages among various levels of injured parties is too complex a task for courts to undertake as they would require parties to trace alleged overcharges through multiple layers of distribution. Any attempts to do so would yield unreliable results.[54]

It is argued that direct purchaser actions can ensure efficiency because fewer plaintiffs economise litigation costs. Transaction costs involved in coordinating class actions can be reduced compared to a situation with many fragmented indirect cases.[55] Thus, to ensure efficiency, in *Illinois Brick*, indirect purchasers were banned from pursuing antitrust damage actions in the federal courts to recover overcharges paid to members of cartels, or monopolists.[56] From that perspective, it makes sense to put all monetary incentives with the direct purchaser, since efficiency could be best served by concentrating the right to recover exclusively in

---

[52] See *Illinois Brick Co. v. State of Illinois*, 431 U.S. 720(1977) , at 737-741.
[53] *Illinois Brick Co. v. State of Illinois*,431 U.S. 720(1977), at 732-733.
[54] *Illinois Brick Co. v. State of Illinois* 431 U.S. 720 (1977) at 725-726 ; For further analyses on *Illinois Brick* see Larue, P. H. and Newton, J. M., "Legislative Progress in Responding to the Illinois Brick Decision", 23Antitrust Bulletin 263, 1978, p.263-276; Joyce, J.M. and R.H. Mcguckin, "Assignment of Rights to Sue under Illinois Brick: An Empirical Assessment", Antitrust Bulletin 31(1), 1986, p. 235-259; Sneeden, E. M., "Illinois Brick–Do We Look to the Courts or Congress", Antitrust Bulletin 24, 1979, p.205-231; Snyder, E. A., supra note 16, pp. 469-482.
[55] See generally, W.M. Landes and R.A. Posner, supra note 43; John Pheasant, "Private Damages Actions", CLI 5 2 (6), 2006, p. 2.
[56] *Illinois Brick Co. v. Illinois*, 431 U.S.720 (1977); Harris, R. G. and Sullivan, L. A., "Passing on the Monopoly Overcharge: A Comprehensive Policy Analysis", 128 University of Pennsylvania L. R., 269, 1979. The decision of *Illinois Brick* has been challenged by saying only overruling them yields the best balance between compensatory justice and deterrence.

the direct purchaser.[57]

It can be argued that the Illinois Brick decision of the Supreme Court embodies the so called indirect purchaser principle. This principle rests "on the judgment that the antitrust laws will be more effectively enforced by concentrating the full recovery for the overcharge in the direct purchasers rather than by allowing every plaintiff potentially affected by the overcharge to bring actions only for the amount it could show was absorbed by it."[58] Under this indirect purchaser doctrine, the right of action is limited to the parties who first purchased from the defendant.

Given these decisions of the Supreme Court in *Hanover Shoe* and *Illinois Brick* cases, it is submitted that these two judgments are good evidence of an antitrust system striving for efficiency at all costs in that the Supreme Court was prepared to sacrifice the right of indirect purchaser to bring actions in order to ensure efficiency.

However, as seen above, in *Illinois Brick* the minority in the Supreme Court considered that the majority view of Illinois Brick judgment flouted Congress' purpose and severely undermined the effectiveness of the private treble damages action as an instrument of antitrust enforcement because the brunt of antitrust injuries is borne by indirect purchaser, often ultimate consumers.[59] According to this view, the Court was regrettably weakening the effectiveness of the private treble-damages action as a deterrent to antitrust violations by, in most cases, precluding consumers from recovering for antitrust injuries. [60]

5.2.3.3 Complementing the Exclusion of the Passing on defence

The *Illinois Brick* result was also driven by the need to ensure consistency with the Court's earlier decision in *Hanover Shoe*. *Illinois Brick* itself focused narrowly on the context of price-fixing by competitors, but it built upon the

---

[57] *Illinois Brick Co. v. State of Illinois*, 431 U.S.720(1977) at 746.
[58] *Illinois Brick Co. v. State of Illinois*, 431 U.S.720(1977) at 735
[59] *Illinois Brick Co. v. State of Illinois*, 431 U.S. 720(1977) at 749.
[60] *Illinois Brick Co. v. State of Illinois*, 431 U.S. 720(1977) at 764.

Supreme Court's prior decision in *Hanover Shoe*.[61] A major factor motivating the Court to preclude offensive passing on in *Illinois Brick* was the idea that plaintiffs and defendants had to be treated alike.[62] The Supreme Court suggested the use of a passing on offence would be inconsistent with the holding in *Hanover Shoe*. The Supreme Court assured that offensive pass-on should be treated like defensive pass-on in *Illinois Brick*. The Court concluded that for reasons of fairness, as well as doctrinal consistency, *Hanover Shoe* had to apply both ways.[63] The Supreme Court finished what was begun in *Hanover Shoe* and completed the installation of the system of exclusive direct purchaser litigation.

Thus, a fundamental premise of the decision was that "whatever rule is to be adopted regarding pass-on in antitrust damages actions, it must be applied equally to plaintiffs and defendants."[64] Therefore, damage that has been passed on to third parties cannot be taken into account *defensively* in a claim between a seller and the purchaser, according to *Hanover Shoe*,[65] and the indirect purchaser is unable to use the passing on principle *offensively* in damages proceedings by making a claim for his loss, according to *Illinois Brick*.[66]

5.2.3.4 Prevention of Multiple Liabilities

Allowing offensive but not defensive passing-on could have created a serious risk of multiple liabilities for defendants. According to judgment of *Illinois Brick*, It is submitted that the US Supreme Court's most important concern in *Illinois Brick* was to protect defendants from the possibility of multiple recoveries given that direct purchasers were entitled, by virtue of *Hanover Shoe*, to recover the full amount of any overcharge by the defendant.[67]

---

[61] *Illinois Brick Co. v.* State of Illinois, 431 U.S. 720(1977) at 731-733

[62] The need for symmetry of *Hanover Shoe* and *Illinois Brick* cases must have dominated in the judgement of *Illinois Brick* case. See. *Illinois Brick Co. v. State of Illinois,* 431 U.S. 720 (1977) at 728-729.

[63] *Illinois Brick Co. v. State of Illinois* 431 U.S. 720(1977) at 728-729; See also, Andrew I. Gavil, supra note 15, p. 13.

[64] See *Illinois Brick Co. v. Illinois*, 431 U.S. 720(1977) at 728-729 ; Donald I. Baker: "Federalism and Fertility: Hitting the Potholes on the Illinois Brick Road", Antitrust 17, Fall 2002, p.14.

[65] *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*, 392 U.S. 481, at 494 (1968).

[66] Tim Ward and Kassie Smith, "Competition litigation in the UK", 2005, Thomson p. 273,7-048.

[67] *Illinois Brick Co. v. State of Illinois* , 431 U.S. 720 (1977) at 720.

The Supreme Court therefore stated that:

" The risk of multiple recoveries[68] created by unequal application of the *Hanover Shoe* rule is much more substantial than in the more usual situation where the defendant is sued in two different lawsuits by plaintiffs asserting conflicting, claims to the same fund."[69]

By a symmetrical application of *Hanover Shoe* and *Illinois Brick*, the Court sought to abandon the imposition of multiple liabilities. Allowing offensive but not defensive use of pass-on would create a serious risk of multiple liability for defendants since even though an indirect purchaser had already recovered for all or part of an overcharge passed on to him, the direct purchaser would still recover the full amount of the overcharge.[70] Thus, the Supreme Court excluded the passing on defence in its earlier judgment in *Hanover Shoe* and it also decided not to accept indirect purchaser actions to avoid a serious risk of multiple liabilities to defendants in *Illinois Brick*.[71]

5.2.4 The Problems in following the US position on indirect purchaser litigation

5.2.4.1 Incorrect Presumption of Damages Passed on to Indirect Purchasers and Incentive of Direct Purchasers

In *Illinois Brick*, the Court stated that "*Hanover Shoe* does further the goal of compensation to the extent that the direct purchaser absorbs at least some and often most of the overcharge."[72] However, it has been claimed that there was and remains no support for the Court's presumption that often most of the overcharge will be borne by the direct purchaser.

---

[68] Multiple damages awards are the situation where many plaintiffs have the damages awards repeatedly for the same illegal behaviour.
[69] *Illinois Brick Co. v. State of Illinois*, 431 U.S. 720 (1977) at 730.
[70] *Illinois Brick Co. v. State of Illinois*, 431U.S. 720 (1977) at 720.
[71] *Illinois Brick Co. v. State of Illinois*, *431U.S.* 720 (1977) at 720. In respect to multiple liabilities, See *United States v. Microsoft Corp.*, 97 F. Supp. 2d 59 (D.D.C. 2000), aff'd in part, rev'd in part, *United States v. Microsoft Corp*, 253 F.3d 34 (D.C. Cir. 2001).
[72] See *Illinois Brick Co. v. State of Illinois*, 431U.S. 720 (1977) at 746

On the one hand, under *Illinois Brick*, it is notable that single products simply sold through minimal levels of distribution are lumped together and treated the same as component products. This is criticized by those who claim that such a one size fits all per se rule is ill-fitting to the broad range of possible circumstances. In practice, passed on damage from defendants to direct purchasers may or may not occur in any given case.[73] According to the Bobtail Bench Memo related to the *Illinois* case itself from Gene Comey, Justice Powell's Clerk, to Lewis F. Powell, Jr., Associate Justice "it is a rare case in which as a matter of the laws of economics the amount of a price increase of an input at one stage of distribution is passed on in full to the next stage in the chain."[74] Justice Powell's clerk Richard Meserve also insisted, "the indirect purchaser may on occasion be forced to bear all the harm from the violation."[75] From the Bench Memos of Justice Powell's Clerk, it can be suggested that in fact the opposite of the Court's assumption is true. There is a high possibility that downstream purchasers such as direct purchasers might mitigate the overcharge by passing it on to their customers such as indirect purchasers.[76] Often most direct purchasers do pass-on all or part of the overcharge to their customers rather than absorb it.[77]

In the other hand, in the *Illinois Brick* case, the Supreme Court did not consider if suppliers (manufactures) are monopolists. However, if suppliers (manufactures) *are* monopolists direct purchasers may not bring actions because they do not want to disrupt the relationship with the supplier.[78] If the infringer possesses market power the direct purchaser may few alternatives when the relationship sours. Under such circumstances, direct purchasers may be especially reluctant to risk rupturing their relationships with their suppliers by initiating antitrust litigation against them because retaliation could be costly.

---

[73] See Gavil's comment on *Illinois Brick* case, p.735; See, also Andrew I. Gavil, supra note 15, p. 16.
[74] Bobtail Bench Memo, supra note 41, at 4
[75] See Bench Memo from Richard Meserve to Justice Blackmun's Clerk, Harry A. Blackmun, US Supreme Court in *Ill. Brick Co. v. Illinois* (No. 76-404) (Mar.19, 1977), at 3
[76] Carlo Petrucci, supra note 25, p.33.
[77] Andrew I. Gavil, supra note 15, p. 16-17. See also , "Antitrust Enforcement Act of 1979: Hearings on S. 300 Before the Senate Comm.", *Judiciary*, 96th Cong., 1st Sess. 69-77,1979; Hovenkamp, "The Indirect Purchaser Rule and Cost-Plus Sales", 103 Harv. L. Rev. 1717, 1990, pp. 1726-1727 and n.46
[78] *Illinois Brick Co. v. State of Illinois*, 431 U.S 720(1977) at 746.

It has been suggested that perhaps more so today than in 1977 direct purchasers may be less inclined than ever to risk rupturing their relationships with suppliers because more suppliers have a dominant position today.[79] Harris and Sullivan pointed out that there is no empirical evidence that direct rather than indirect purchasers are more likely to bring actions.[80] There are significant examples of major antitrust infringements being challenged by only rivals, the government, or indirect purchasers – but not by direct purchasers. For instance, in the *Microsoft* case,[81] although many class actions have been brought by consumers or a number of Microsoft rivals, none of the major direct purchasers such as Original Equipment Manufacture(hereafter, OEM) of Microsoft Windows initiated treble damage actions against Microsoft. [82] That was because Microsoft involved bundling, not price fixing, and direct purchasers did not suffer any damage from Microsoft's antitrust conduct.

It is submitted that there is a high probability that if direct purchasers are not willing to bring actions, private antitrust actions will have little compensatory and deterrent effect because indirect purchasers are not able to bring damages actions before court.

5.2.4.2 Incorrect Presumption of the Calculation of Passed on Damage

When the downstream chain is complicated and long, the effects of the overcharge are material and they do require an onerous inquiry. If the downstream chain is complicated and long, however, it can be argued that compensation for passed on damage is often only possible through increased efforts by the direct purchaser because only the direct purchaser is able to prove the damage caused by an anticompetitive activity.[83] The challenge is therefore how to prove the effects of the overcharge when the distribution chain is long and complex.[84]

---

79 Andrew I. Gavil, supra note 15, p.15.
80 Harris and Sullivan, supra note 56, p. 273
81 Microsoft Corp. Antitrust Litigation, 214 F.R.D. 371 (D.Md. 2003).
82 Andrew I. Gavil, supra note 15, p. 17.
83 Ulf Boge, Konrad Ost, supra note 17, p.200.
84 *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*, 392 U.S 481 (1968), at 494.

In *Illinois Brick*, the Supreme Court questioned the capacity of economics itself to deliver reliable theories to establish both the passed on overcharge and apportionment of damage. The Supreme Court rested on the assumption that economic analysis is incapable of tracing the actual effects of passed on overcharges through multiple distribution layers. US Supreme Court assumes that "always or almost always" pass-on will be immeasurable.[85] The argument is that it becomes more and more difficult, if not impossible for indirect purchasers at subsequent levels of the market to prove causality and attributable damage.[86]

It should be noted that the European Commission Staff Working Paper accompanying the White Paper stated that:

"As far as the quantification and distribution of the damages are concerned, the more loosely the group of victims is defined, the more difficult it will be to precisely quantify the harm suffered by all the individual plaintiffs and distribute the damages awards to the victims".[87]

Furthermore, the views of marketing experts on the determination of the final price should be noted. According to Palmer, marketing studies show that the final price of a product is determined by three aspects. First is the cost-based pricing which is the cost of inputs of the final product. Second is the competitors' pricing which is how competitors price their products. Third is the demand-based pricing which is how much customers are prepared to pay.[88] It is argued therefore that the theory suggests that a combination of these three factors makes the task of identifying the effects of the overcharge on the final price even more difficult, since the inquiry is not limited to the increase in the cost of a certain input.[89]

However, as Justice White argued in the *Kansas* case, the majority opinion in *Illinois Brick* was that *Illinois Brick* case should be treated as an exception,

---

[85] *Illinois Brick Co. v. Illinois*, 431 U.S 720(1977) at 741-744.
[86] Ulf Boge, Konrad Ost, supra note 17, p.200.
[87] Commission Staff Working Paper accompanying the White Paper, supra note 2, p.18.
[88] A. Palmer, "Introduction to Marketing : Theory and Practice", Oxford University Press, 2000, p.322.
[89] Carlo Petrucci, supra note 25, pp. 37-38.

applicable only in circumstances where the plaintiff can offer no readily provable damages:

"In sum, I cannot agree with the rigid and expansive holding that in no case, even in the utility context, would it be possible to determine in a reliable way a pass-through to consumers of an illegal overcharge that would measure the extent of their damage. There may be cases, as the Court speculates, where there would be insuperable difficulties. But we are to judge this case on the basis that the pass-through is complete and provable. There have been no findings below that this is not the fact. Instead, the decision we review is that consumers may not sue even where it is clear and provable that an illegal overcharge has been passed on to them and that they, rather than the utility, have to that extent been injured. ..... I would hold that the petitioners in this case have standing to sue. This result would promote the twin antitrust goals of ensuring recompense for injured parties and encouraging the diligent prosecution of antitrust claims."[90]

As to this difficulty of allocating damages among direct and indirect purchasers, it has therefore been argued, as Justice White did, that while problems undoubtedly still remain, it does not seem necessary to preclude all indirect purchaser actions.[91] The American Bar Association assured the European Commission that passed on damages are not too difficult to calculate.[92] Economists have claimed that the procedural and analytical tools for addressing the complexity of allocation of damages through the distribution chain may not be perfect but they are more manageable today than in 1977 because far more robust econometric tools exist.[93] According to submissions made to the Antitrust Modernization Committee, advances since 1977 in data capture, storage and

---

[90] *Kansas v. Utilicorp. United, Inc.*, 497 U.S. 199(1990), at 225-26.

[91] See Ronald Cotterill, Leonard Egan and William Buckhold, "Beyond Illinois Brick: The Law and Economics of Cost Pass-through in the ADM Price Fixing Case", 18 Review of Industrial Organization 45, 2001; Curtis R.Taylor, "Indirect Damages from Price Fixing: The Alabama Lysine Case", 18 Review of Industrial Organization 33, 2001.

[92] Comments of the Section of Antitrust Law and the Section of International Law of the American Bar Association in Response to the Request for Public Comment of the Commission of the European Communities On Damage Actions for Breaches of EU Antitrust Rules, April, 2006, p. 40-41.

[93] See Cotterill, Egan and Buckhold, supra note 91 ; Taylor, supra note 91 ; Mark J. Bennett and Ellen S. Cooper, "Testimony of Concerning Indirect Purchaser Actions before the Antirust Modernization Commission", 2005, p. 6; Joel M. Cohen and Trisha Lawson, "Navigating Multistate Indirect Purchase Lawsuit", 15 Antitrust 29, 2001, p.6-11.

manipulation, as well as in econometric modelling have made ascertainment, allocation and distribution of damage less problematic.[94] The UK OFT has also stated that whilst it is true that quantification of damages may be more complex, it would seem possible for effective, fair and reasonable systems to be devised in order to calculate damages in the aggregate without the necessity to prove the individual loss suffered by each indirect purchaser such as consumer. [95]

For instance, in a cartel case, damages may be proved and assessed in the aggregate by statistical or sampling methods, or by the computation of illegal overcharges per unit of output multiplied by the total market output. [96] Therefore, as one commentator has observed, with the increasingly widespread availability of sophisticated econometrics and statistical analyses and the growing acceptance of these techniques by the courts, expert testimony can facilitate complex determinations of damages in a manner.[97]

Some states of the US have already demonstrated harm to downstream purchasing consumers and governmental entities. In a series of federal court cases with supplemental state claims, the states have submitted damages calculations in a wide variety of pharmaceutical cases by using available data. Some cases such as *Mylan Laboratories* highlight the success of the Attorneys General, and others, in obtaining recoveries under state law on behalf of indirect purchasers.

In *Mylan Labs,* the Attorneys General of thirty-three states conducted a joint litigation with the FTC. The states represented government agencies and consumers. The majority of them were indirect purchasers of the anti-anxiety drugs lorazepam and clorazepate. The FTC and states jointly settled with defendants for $100 million. Under this settlement, affected consumers received compensation equal to 100% of the total value of their purchases. In total, 203,471 consumer refund checks were mailed worth $42,937,014.80. In addition, state agencies received $28,217,983.00. Over $2,880,000 was distributed under the express condition that the funds were to

---

[94] M. J. Bennett and E. S. Cooper, Ibid., p.6.
[95] The Office of Fair Trading, "Private Actions in Competition Law: Effective Redress for Consumes and Business", OFT916, 2007, p.22.
[96] Ibid.
[97] Edward P. Henneberry, supra note 1, p.9.

be used in a manner reasonably targeted to specifically benefit.[98]

It has been argued that this case provides important evidence that downstream purchasers with non-speculative claims could recover and that it call into question the continued viability of *Illinois Brick.*[99] Moreover, when the Supreme Court decided *Illinois Brick* in 1977, trial courts were limited in their ability to evaluate and exclude possibly dubious expert testimony.[100] Since then, the Supreme Court has recognized that the federal district courts are qualified to evaluate expert testimony and act as gatekeepers for the admission of such testimony.[101] Courts have been permitted to weigh such factors as the nature of the plaintiff's damage and the relationship between the specific damage and the antitrust infringement.[102]

Most of all, it is submitted that if indirect purchaser actions are allowed, concern about the difficulty of accurate quantification of damage may be overcome by accurately allocating burden of proof between plaintiff and defendant. If the defendant tries to use passing on defence to avoid liability for the damage of direct purchasers, he should bear the burden of proving the fact the overcharge was passed on by the defendant. Many of the perceived concerns as to the difficulty of recognizing indirect purchaser actions could probably be ameliorated by requiring some sophisticated economic analysis or reversing burden of proof which the defendant has to submit.

5.3.4.3 Conflict with Ensuring Consumer Interests

The effectiveness of private enforcement depends on the consumer's proactive attitude. It is often claimed that the consumer is better placed to promote a civil action against the company which has illegally disrupted competition because

---

[98] *FTC v. Mylan Labs, Inc.*, 99 F. Supp. 2d 1 (D.D.C. 1999).
[99] M. J. Bennett and E. S. Cooper, supra note 93, pp.7,14; Joel M. Cohen and Trisha Lawson, supra note 93, p.14.
[100] M. J. Bennett and E. S. Cooper, supra note 93, p. 6.
[101] *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993).
[102] Compare *Blue Shield v. McCready*, 457 U.S. 465 (1982); see also, *Associated General Contractors v. California State Council of Carpenters*, 459 U.S. 519 (1983).

consumers themselves may in certain instances be the victims of antitrust infringements.

However, in *Illinois Brick,* as I have seen above, the Supreme Court denied indirect purchasers' rights to bring damages actions before the (federal) courts. *Illinois Brick* appeared to be in conflict with what is seen as the avowed pro-consumer purposes of the Sherman and Clayton Acts. One commentator has identified the problem as being that *Illinois Brick* was "not a creature of Congress".[103] It was rather a "policy interpretation of Section 4 by the Supreme Court, delivered without any evidence that Congress had intended to prevent indirect purchasers from recovering under the Clayton Act".[104]

During the *Illinois Brick* case, Richard Meserve, Justice Blackmun's Clerk pointed out what is perhaps the most obvious obstacle to a rule barring indirect purchasers from actions: the fact that "[t]he statute makes no mention of a distinction between direct and indirect purchasers."[105]

The exclusion of indirect purchaser is described as destructive of the "fundamental character of the private antitrust action" and against Congress' intent in providing for the private right of action.[106] Furthermore, at the time of *Illinois Brick*, the modern Rule 23 of the Federal Rules of Civil Procedure[107] had not been adopted, and the class action practice under it had not developed. Thus the fear of ultimate consumers not having a remedy is less serious in 1977 than it would be today.[108] Therefore, indirect purchasers such as consumers *should* have standing. True symmetry between *Illinois Brick* and *Hanover Shoe*, it has been argued, would

---

[103] Donald I. Baker, supra note 14, p.14-15.
[104] Ibid.
[105] See Bench Memo from Richard Meserve, supra note 75, at 3.
[106] *Crouch v. Crompton Corp.*, No. 02 CVS 4375. 2004 WL 2414027, at * 5 (N.C. Super. Oct. 28, 2004).
[107] The Federal Rules of Civil Procedure (hereafter, FRCP) are rules governing civil procedure in US district (federal) courts for civil actions. The FRCP are promulgated by the US Supreme Court pursuant to the Rules Enabling Act, and then approved by the US Congress. Although federal courts are required to apply the substantive law of the states as rules of decision in cases where state law is in question, the federal courts almost always use the FRCP as their rules of procedure. States determine their own rules which apply in state courts, though most states have adopted rules that are based on the FRCP. The FRCP was completely rewritten, effective since December 1, 2007, under the leadership of a committee headed by law professor Bryan A. Garner, for the purpose of making them easier to understand.
[108] Donald I. Baker, supra note 14, p.15-16.

have required permission of indirect purchaser actions to encourage greater deterrence and greater compensation by consumers.[109]

5.2.5 Exceptions to the *Illinois Brick Doctrine*

However, there are two exceptions to the *Illinois Brick Doctrine.* These exceptions are considered to be necessary to prevent an infringer from avoiding and being insulated from antitrust liability.

5.2.5.1 'Cost-plus' Contracts between direct and indirect purchasers

A cost plus contract is a contract where a contractor is paid for all of its allowed expenses to a set limit plus additional payment to allow for profit. As the Court observed in *Hanover Shoe*, there might be situations where the direct and indirect purchaser had contractually agreed to pass on overcharge prices by using a *cost-plus pricing formula.*[110] In situations where the middleman supplies the product to the indirect purchaser on a cost-plus contract, the Court reasoned that the direct purchaser is not at risk of suffering antitrust damage. The Court noted that:

"It can be recognized that there might be situations--for instance, when an overcharged buyer has a pre-existing *cost-plus contract*, thus making it easy to prove that he has not been damaged--where the considerations requiring that the passing-on defence not be permitted in this case would not be present." [111]

In the *Microsoft* case, it was deemed to be established that 100% of the overcharge is passed on to the indirect purchaser where it has a cost-plus contract that commits its customer to purchase a fixed price of the product. They may have in fact earned a percentage profit on the overcharge.[112]

---

[109] Andrew I. Gavil, supra note 3, p. 615-616.
[110] *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*, 392 U.S. 481 (1968), at 494.
[111] *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*, 392 U.S. 481(1968), at 494; See also *Lefrak v. Arabian Am. Oil. Co.*, 487 F. Supp. 808 (S.D.N.Y. 1980).
[112] *Microsoft Corp. Antitrust Litigation*, 214 F.R.D. 371 (D.Md. 2003). This case involved a class-action by consumers against Microsoft for overcharging them for the Windows operating system. The Microsoft

For example, in a cartel case, if all competing direct purchasers face the same overcharge, they are more likely to pass it on precisely because they know that all others have faced the same price increase. They themselves may act as members of cartel. Therefore, the indirect purchaser can bring damages actions against the upstream producer.[113]

5.2.5.2 The Defendants own or control the Direct Purchasers

An exception is also in order when the defendant owns or controls the direct purchaser.[114] In cases where the middleman is owned or controlled by the upstream producer who took part in the conspiracy, the relation between the indirect purchaser and the producer becomes essentially a direct one.[115] In such cases, indirect purchasers could bring actions against upstream producer.[116]

5.3 Indirect Purchaser Litigation in Korea

5.3.1 Overview of Indirect Purchaser Litigation in Korea

5.3.2 Principles of Permitting Indirect Purchaser Actions in Korea

The Korean courts have not yet ruled on whether indirect purchasers may bring damages actions in competition area. It is not easy to see how Korea can ensure that indirect purchasers such as consumers are able to bring damages actions while also ensuring that direct purchasers such as wholesalers, who are more likely

---

case illustrates the challenges posed by multiple liabilities. Following the initiation of the government's prosecution of Microsoft in May 1998, Microsoft faced 64 follow-on federal antitrust actions and 117 state court actions. Almost all of these actions were class actions. Of the 117 state court class actions, forty-four were removed to federal court. Seventy-three cases were deemed irremovable by Microsoft and left to proceed in state courts.

113 Firat Cengiz, supra note 12, p.18.

114 See *Illinois Brick Co. v. State of Illinois* 431U.S. 720 (1977) at 730 n.16; see also *California v. ARC Am. Corp.*, 490 U.S. 93, 97 n.2 (1989) This case noted *Illinois Brick*'s two exceptions.

115 See ABA Section of Antitrust Law, Indirect Purchaser Litigation Handbook, 2007, p. 18-19, 21.

116 Firat Cengiz, supra note 12, p.18.

to bring damages actions are not discouraged from doing so.

It is worth considering the US position on indirect purchaser because the US has particularly striking rules on the indirect purchaser actions, embodied in the *Illinois Brick* case. The US Supreme Court prohibited indirect purchaser litigation primarily because of the considerations discussed above. However, there are many problems with the US position, as discussed above.

As I discussed above, the exclusion of indirect purchaser actions has had many problems.[117] In Korea, the exclusion of indirect purchaser actions can be destructive of the fundamental principle of private competition actions because of four main principles of full effectiveness, protecting consumers' interests, prohibition of unjust enrichment and ensuring effective and efficient enforcement.

5.3.2.1 The Principle of Full Compensation

The exclusion of the passing on defence in Korea would most probably necessitate the denial of standing to indirect purchasers in order to avoid duplicative damages awards.[118] However, it is submitted that the exclusion of indirect purchasers' actions would be contrary to Korean law, as explained below, and inconsistent with the courts' ruling that full compensation requires that damages actions should be open to anyone to claim damages for a breach of competition law.[119]

Full compensation means to ensure that all victims from anticompetitive conduct have access to effective mechanisms for compensation for the harm which is composed of actual loss resulting from the illegal overcharge and the loss of profit resulting from the reduced sales. To ensure full compensation, the Competition Law states that the legal or natural person causing damage is obliged to compensate the damage that arises through his illegal practice without defining

---

117 In respect to the problems of exclusion of indirect purchaser actions, see section 5.2.4 which deals with the problems in following the US position on indirect purchaser litigation.
118 See section 4.3.2.4 which deals with probability of multiple liabilities if Korea prohibit passing on defence.
119 In respect to courts' ruling, see section 3.2.1 which deals with courts' ruling about full effectiveness in Korea.

any categories of persons entitled to damage.

Competition Law 56 (Competition Damages Actions) states that:

If an enterpriser or an enterpriser's organization violates the provisions of this Act, and thereby inflicts on a person any damage, he or the organization shall be liable for compensation of such damage to the person. A natural limitation is an identifiable damage. [120]

The Korean Civil Law also recognizes that anyone could have compensation for the damage that arises through an infringer's illegal practice.[121]

If indirect purchasers' actions were not allowed, it would result in full compensation being unavailable because the damaged party would have no redress in damages. This approach does not correspond to the principle of full compensation under the Civil and Competition Laws in Korea. Given these Acts, even though there have been no cases in which the Korean courts ever accepted this position there is no reason why indirect purchasers should not benefit from actions for damages. Therefore, to ensure full compensation, no limitation should be placed on the categories of persons who can recover damages. Both direct and indirect purchasers should have the right to bring damages action even if there are no specific rules about the standing of indirect purchasers. Indirect purchaser could include competitors, consumer or other market participants that participated in the infringement but suffered loss. The only limit should be that those entitled to recover must be persons with damage caused by anticompetitive conduct.

5.3.2.2 The Principle of Protecting Consumers' Interests

As I discuss in Chapter 1, one of the objectives of the Competition Law is to

---

[120] Competition Act 56(Competition Damages Actions) This is the KFTC's official English translation. In Korea, the primary object of damages action is compensation for a victim not deterrence of anticompetitive conducts, punishment for an infringer or disgorgement of illegal gain. See generally section 1.2.2.1 which deals with the current situation of private competition enforcement in Korea.
[121] Civil Law (760) Provision of damages actions under Civil Law is fundamental to damages actions under Competition Act.

protect consumer interests.[122] The definition of a consumer is fairly broad.[123] It can include indirect purchasers such as intermediaries and end consumers who have no direct contract with the infringer.

Indirect purchaser actions could provide an important means of compensating consumers because most indirect purchasers are small private parties such as consumers.[124] If indirect purchasers' actions are not allowed, there is a high possibility of prejudice to consumers' interests. The judgment of Supreme Court in *Illinois Brick* impairs consumers' interests by eliminating the consumers' right to bring competition damages actions.

To protect consumer interests, it is important to ensure the right of indirect purchasers to bring actions because nearly all competition infringements could result in economic harm to other market participants, who may or may not be contractually related to the competition infringer. The standing of indirect purchasers such as consumers is consistent with the principle that competition law should maximise consumer welfare.

As was said in *Illinois Brick,* multiple liabilities could be avoided through procedures for compulsory joinder that enable the judge to allocate the damage between direct and indirect purchasers in the same proceeding.[125] To encourage consumer actions and avoid multiple liabilities, it is necessary to recognize group actions by which indirect purchasers such as consumers would be able to bring actions. To protect consumer interests, the various group actions rules and procedures have to be addressed in order to provide for damages actions to consumers. I discuss group actions in Chapter VI.

---

[122] See section 1.3.2.1 which deals with objectives of competition law in Korea; Competition Act 1(Objective of Competition Act)
[123] Consumer Fundamental Act(2)
[124] Joel M. Cohen, Trisha Lawson, supra note 93, pp.566-568.
[125] *Illinois Brick Co. v. State of Illinois*, 431 U.S. 720 (1977) at 762.

5.3.2.3 The Principles of Fair and Just Compensation and Efficient and Effective Deterrence

In the US, in *Illinois Bricks*, the US Supreme Court pursued the balance between granting everyone who might have suffered a loss a right to bring actions and the interest of seeking efficient enforcement. In this case, however, to ensure effective deterrence through focusing on direct purchaser's right for compensation, the US sacrificed indirect purchasers' right for compensation.[126]

As already seen in the sections above,[127] in order to promote efficient and effective damages actions the competition rules may require prioritisation of the rights of direct purchasers over indirect purchasers because indirect purchasers are typically a disparate group who will normally be less inclined than direct purchasers to initiate proceedings, given that they would only recover damages based on the small amount of overcharge passed on to them. Furthermore, in many cases the chain of transactions from the original infringer to the indirect purchasers such as consumer is long. Thus, permitting indirect purchasers' actions having small and distant injuries, rather than encouraging direct purchaser actions, could lead to insufficient compensation and lower deterrence because of the decreased incentive to sue.

However, private competition damages actions are potentially an important channel for both of the fair and just compensation and effective and efficient deterrence.

On the one hand, Korean commentators have argued that fairness could be achieved through compensating real victims for damage. To ensure fairness the harm-doer has to give redress to the harm-sufferer.[128] Damages actions for indirect purchasers against the infringements of competition law have a strong fairness aspect which aims to make good any harm done to victim. Allowing the direct purchaser to recover while denying the indirect purchaser the right to recover is

---

126 See section 5.2.3 which deals with rationale of decision of Illinois Brick.
127 See section 5.2.3 which deals with rationale of decision of *Illinois Brick*.
128 . Kim Gu-Nyeon, "A Study on Problems on Private Remedies for Damages of Korean Antitrust Law", 14 Comparative Private Law 261, 2007, p. 278

unfair because it allows a direct purchaser who may neutralise or reduce the harm by passing on damage to indirect purchasers to collect windfall recoveries, while leaving an indirect purchaser who is the true victim of the illegal overcharge without a remedy. Thus, indirect purchasers should be entitled to bring actions against infringers.

As I already discussed in section [3.2] the primary objective of damages actions in Korea is compensation not deterrence, punishment or disgorgement of illegal benefit.[129] Denying indirect purchasers to have standing is consistent with the principle of compensatory justice.

On the other hand, damages actions for indirect purchasers against the infringements of competition law do have a strong efficiency aspect which aims to make individuals obtain redress effectively when their rights are infringed by a breach of competition law. In this sense, effectiveness can be understood as 'effective judicial protection'.

Fair and just compensation and effective and efficient deterrence are intertwined.[130] Compensation and deterrence could be impeded by the denying certain victims' rights to recover damages because allowing standing to indirect purchasers for compensation could further discourages anti-competitive agreements. [131] Even in the US, there is a strong body of opinion arguing that an effective private damages regime must provide a remedy for all victims of the overcharge even where that victim is an indirect purchaser.[132] Thus, fair and effective enforcement system can be found by compensating for indirect purchasers such as consumers.

---

[129] See section 3.2.1 which deals with the primary objective of damages actions.
[130] See W. P. J. Wils, "The Optimal Enforcement of EC Antitrust Law: Essays in Law and Economics", Kluwer Law International, 2002, section 2.2.4; K. Roach and M.J. Treblicock, "Private Enforcement of Competition Laws", 34 Osgoode Hall L.J. 461, 1996, p.498.
[131] As shown above section 5.2.3.1, this argument is challenged by those who believe that when a conflict between compensation and deterrence arises, the latter is to be preferred and is maximised by granting standing to direct purchasers only.
[132] Comments of the Section of Antitrust Law and the Section of International Law of the American Bar Association in Response to the Request for Public Comment of the Commission of the European Communities On Damage Actions for Breaches of EU Antitrust Rules, April, 2006, p. 40.

5.4 Indirect Purchaser Litigation in the EU

The question of the standing of indirect purchasers in competition damages cases has not yet been directly answered by the ECJ. The ECJ has touched upon these issues, particularly in the two cases of *Crehan*[133] and *Manfredi*[134] but has not gone into specifics or set out clear rules.[135] The objective of the Commission, however, is to achieve a system which not only ensures that those who suffer loss can seek compensation but also provides appropriate incentives to promote actions by those who are most likely to be successful. It discussed options in respect of indirect purchaser actions in the light of this aim in its Green Paper on Damages Actions[136] and made proposals in its White Paper.[137]

5.4.1. Overview of Indirect Purchaser Action: Trade- off between Fair and Effective Damages Actions

Commissioner Neelie Kroes, in discussing the Commission's view of private damages actions, has often addressed the fairness versus efficiency problem. After the publication of the Commission's Green Paper in 2005,[138] she recognized the 'alleged tension' between a fair and just system and an effective and efficient system of private competition enforcement.

On the one hand , Commissioner Neelie Kroes stated that:

"A fair and just system of private enforcement implies that those who suffer losses as a result of an anticompetitive infringement can get compensation, and fairness and justice also imply that those who infringed the competition rules cannot easily escape from their duty to compensate for the damage caused by their

---

133 *Courage v Crehan*, C-452/99, [2001]ECR I-6297
134 *Manfredi v. LIoyd Adriatico Assicurazioni SpA*, C-295/04, [2006] ECJ, 348
135 Firat Cengiz, supra note 12, p.28.
136 European Commission, "Green Paper - Damages Actions for Breach of the EC Antitrust Rules", COM (2005) 672 final, section 2.4.
137 European Commission,"White Paper on Damages actions for breach of the EC antitrust rules", Com (2008) 165 final, section 2.6.
138 Supra note 136, section 2.4.

infringement." [139]

On the other hand, Commissioner Neelie Kroes acknowledged that :

"An effective and efficient system of private enforcement needs those who are most probable to be successful in bringing private competition actions should be given incentives to do so: '[e]fficiency further requires that the overall costs for society in processing a private competition action do not completely outweigh the possible benefits of such an action."[140]

The tension to which Commissioner Kroes referred is, of course, manifest in the vexed question raised in this Chapter and in Chapter 4, of whether the defendant in private competition proceedings in the EU should be able to invoke the passing on defence and whether indirect purchasers should have standing to bring damages actions.[141]

In the Commission Staff Working Paper annex to the Green Paper, the Commission tried to ensure the trade-off between the purity of a system which protects all relevant rights and an efficient and effective system of competition damages actions.[142] It is suggested that the determining factor could be the effective enforcement of Community law. If limiting the rights of certain individuals to claim is necessary to ensure a system which is more effective in safeguarding the enforcement of Articles 81 and 82 EC, then it is submitted that such limitations should be accepted under Community law. The Commission concluded however that "Given the [above-mentioned] complexities, it is, however, likely that a trade-off between justice in the sense of full recovery for all those who have suffered a loss from an illegal practice and efficiency is inevitable".[143]

Thus, it is desirable to achieve a balance between a fair and just and an

---

[139] Neelie Kroes. "Enhancing Actions for Damages for Breach of Competition Rules in Europe", Dinner Speech at the Harvard Club, Speech/05/533, New York, 2005, p.4.
[140] Ibid.
[141] Gregory P. Olsen, "Enhancing Private Antitrust Litigation in the EU", 20 Antitrust 73, Fall 2005, p.74.
[142] European Commission, "Commission Staff Working Paper annex to the Green Paper on Damages actions for breach of the EC antitrust rules", SEC (2005) 1732 at para. 179.
[143] Ibid.

effective and efficient system. To achieve this balance it is necessary to design a system which protects the interests of victims without imposing a disproportional burden on the defendant.

5.4.2 Desirability of Permitting Indirect Purchaser Litigation in the EU

The ECJ has recognized the direct effects of Articles 81 (1) and 82 EC Treaty in relation between individuals and creating rights for the individuals which the national courts must safeguard in *Francovich,*[144] *Crehan*[145] and *Manfredi.*[146]

The *Francovich* case is important in the development of private competition litigation because it has explicitly provided for a damages remedy of wide scope for breach of Community law which the national courts is required to recognize and enforce. In this case, it is submitted that the remedies principles of Community depart from the principle that Community law provides the substantive rule and national law provides the procedures and remedies.

In *Crehan,* the ECJ also confirmed the general principle of direct effect which was applied in the context of Community competition law in *Francovich.*[147] The ECJ recognized the right to recover losses of any individual, which could possibly include indirect purchasers.[148] In this case, the ECJ stated that infringements of Art.81 EC in principle entitled *any individual* to claim damages.[149] In *Crehan,* the ECJ confirmed the principle that:

"[I]t should be recalled that the full effectiveness of Article 81 EC and, in particular, the practical effect of the prohibition laid down in Article 81(1) EC

---

[144] *Francovich and Bonifaci v. Italy, Joined Cases C-6/ 90 and C-9/90,* [1991] ECR I-5357, para 2-4
[145] *Courage v Crehan,* C-453/99, [2001]ECR I-6297 at 23.
[146] *Vincenzo Manfredi v Lloyd Adriatico Assicurazioni SpA,* C-295/04, [2006] ECR I-06619. para 31, 51, 58-59, 61-64
[147] *Courage v Crehan,* C-453/99, [2001]ECR I-6297 at para 23.
[148] *Courage v Crehan,* C-453/99, [2001]ECR I-6297 at para 26.
[149] *Courage v Crehan,* C-452/99, [2001]ECR I-6297 at para 26. Advocate General Mischo even stated in his Opinion that the individuals protected by Art.81 EC were primarily third parties, i.e. consumers and competitors who were affected by a prohibited agreement. A.G. Mischo Opinion delivered on March 22, 2001 at para 38..

would be put at risk if it were not open to any individual to claim damages for loss caused to him by a contract or by conduct liable to restrict or distort competition."[150]

Any individual can rely on a breach of Article 81(1) of the EC Treaty before a national court even where the action was brought before the court by a party to an anticompetitive agreement against another party to the agreement. However, no specific decision on the entitlement of indirect purchasers to claim damages against defendant has been taken.[151] In addition, the ECJ explicitly stated in its *Crehan* decision that it was left to the discretion of the Member States to decide on procedural issues as long as it is consistent with the principle of efficiency and equivalence.[152] The Court did not exclude national provisions or case law that lead to barring damages actions brought by certain indirect purchasers for reasons of remoteness.[153] Consequently, it can be argued that the ECJ did not rule out the possibility that Community law would allow a limitation or exclusion of the indirect purchaser standing at national level.

However, the prohibition of any limits of standing is reaffirmed by the ECJ in *Manfredi*. In *Manfredi*[154] the ECJ recognized the right of persons with a 'relevant legal interest' could sue. These persons could include indirect purchasers. In this case, the Italian Court asked whether individuals who purchased motor insurance from insurance brokers and agents should be entitled to bring damage actions against the insurance companies which were found to operate a price-fixing cartel in infringement of Article 81 EC. In its response to this question, the ECJ reconfirmed the principle of direct effect which must be open to any individual to exercise his rights.[155] In *Manfredi,* the ECJ stated that:

"It follows that any individual can claim compensation for the harm suffered where there is a causal relationship between that harm and an agreement or practice

---

[150] *Courage v Crehan*, C-452/99, [2001]ECR I-6297 at para. at 26
[151] See Ulf Boge, Konrad Ost, supra note 17, p.201-202.
[152] *Courage v Crehan*, C-452/99, [2001]ECR I-6297 at para. 30.
[153] Commission Staff Working Paper accompanying the White Paper, supra note 2, para. 15.
[154] Vincenzo Manfredi v Lloyd Adriatico Assicurazioni SpA, C-295/04, [2006] ECR I-06619.
[155] Vincenzo Manfredi v Lloyd Adriatico Assicurazioni SpA, C-295/04, [2006] ECR I-06619, at 60.

prohibited under Article 81 EC".[156]

If third parties action is recognized from the direct effect of the competition rules, an indirect purchaser who is affected by an infringement which may not be easy to establish, could have the right to claim for compensation.

In respect to *Manfredi* case, the crucial question is, whether *Manfredi*[157] created a Community-wide right of standing for indirect purchasers. In this case, as the ECJ neither mentioned the concept of indirect purchasers nor went into the specific aspects of the right of indirect purchasers to bring actions. Thus, it can be argued that *Manfredi* repeated a general principle of Community law in a specific field such as insurance industry rather than declaration of a universal right of indirect purchasers to bring actions.[158]

The Court's ruling in *Francovich,* [159] *Courage*[160] and *Manfredi* seems to go against any limitations with regard to any particular category of individuals.

Commissioner *Kroes* also made clear that:

"...a private enforcement system which disables or even discourages final consumers from bringing actions for damages is unacceptable."[161]

Allowing indirect purchase actions is also supported by the vast majority of competition authorities of Member States in their comments on the Green Paper where a majority of Members States are in favour of allowing the passing on defence and indirect purchaser actions.[162]

The White Paper interpreted the ECJ's above rulings as demanding that

---

[156] Ibid. para 61.
[157] Ibid.
[158] Firat Cengiz, supra note 12, p.30; John Pheasant, "Private Antitrust Damages in Europe: The Policy Debate and Judicial Developments", Antitrust, Fall 2006, p.61.
[159] *Francovich*, Joined cases C-6/90 & C-9/90, [1991] ECR I-5357 at [32].
[160] *Courage v Crehan*, C-452/99, [2001]ECR I-6297 at paras. 23-24.
[161] Neelie Kroes's speech/05/533, supra note 139.
[162] In response to its request on public discussion the Commission received almost 200 comments from business, academic and government representatives.

indirect purchaser actions should be possible. According to White Paper, "Any citizen or business who suffers harm as a result of a breach of EC antitrust rules (Articles 81 and 82 of the EC Treaty) must be able to claim reparation from the party who caused the damage." [163] It stated that the aim of the White Paper was to ensure that:

> "..all victims of infringements of EC competition law have access to effective redress mechanism so that they can be fully compensated for the harm they suffered". [164]

Therefore, purchasers of an overcharged product or service who have been able to pass on that overcharge to their own customers should not be entitled to compensation of that overcharge.[165]

However, even if indirect purchaser actions are allowed, still there are problems such as quantification of damage. The White Paper deals with some of the problems of quantification of damage discussed earlier[166] by providing for a rebuttable presumption that the overcharge was passed on in its entirety. The White Paper states that:

> "...an indirect purchaser should be able to rely on the rebuttable presumption that the illegal overcharge was passed on in its entirety down to his level."[167]

Indirect purchaser actions can be facilitated by a presumption that the overcharge has been passed on in its entirety to their level since this would alleviate indirect buyers' burden of proof when they cannot provide accurate evidence of the amount of loss.[168] The presumption can be rebutted by the infringer, for instance by referring to the fact same overcharge price passed on to someone in the

---

[163] White Paper on Damages actions, supra note 137, section 1.1.
[164] Ibid.
[165] Rainer Becker, Nicolas Bessot and Eddy De Smijter, "The White Paper on damages actions for breach of the EC antitrust rules", European Commission Newsletter, ISSN 1025-2266, 2008, p.6.
[166] For problems of quantification of damage, See section 5.2.4.2 which deals with incorrect presumption of damages passed on to indirect purchasers.
[167] White Paper on Damages actions, supra note 137, at section 2.6.
[168] Carlo Petrucci, supra note 25, p.42.

distribution chain than the plaintiff. In practice this presumption will have far-reaching consequences as the infringer will find it difficult to rebut the presumption.[169]

Irrespective of whether national courts permit the passing on defence or not, the European Commission wishes to make both direct and indirect purchaser such as consumer proceedings more effectively by facilitating class action or representative litigation.[170] For the protection of the rights of indirect purchasers such as consumers, the Commission has also explored the possibilities of group actions which might be an efficient form of process given the very low level of individual damage suffered.[171]

It is worth noting that the European Parliament resolution on the White Paper on damages actions for breach of the EC antitrust rules welcomed the White Paper and stressed that the EC competition rules and, in particular, their effective enforcement, required that victims of breaches of the EC competition rules must to be able to claim compensation for the damage suffered.[172] It also recognized collective redress which allows the aggregation of individual action for damages. [173] It took the view that direct and indirect purchasers should have available to them, for the prosecution of their stand-alone or follow-up actions and individual, collective or representative action.[174]

Given the judgments of *Francovich*, *Courage*[175] and *Manfredi*[176] and the proposals in the White Paper[177] and the European Parliament resolution on the White Paper, the US Supreme Court's solution to the balancing of fairness and

---

[169] Tim Reher, "The Commission's White Paper on Damages Actions for Breach of the EC Antitrust Rules", The European Antitrust Review, 2009, p. 3.
[170] Commission Staff Working Paper accompanying the White Paper, supra note 2, para. 30.
[171] See section 6.5 which deals with group actions in the EU; See also Neelie Kroes's speech/05/533, supra note 139.
[172] European Parliament resolution of 26 March 2009 on the White Paper on damages actions for breach of the EC antitrust rules (2008/2154(INI)), para 1.
[173] Ibid., para 4.
[174] Ibid., para 8.
[175] *Courage v Crehan*, C-452/99, [2001]ECR I-6297 at paras. 23-24.
[176] *Manfredi v. LIoyd Adriatico Assicurazioni SpA*, C-295/04, [2006] ECJ, 348.
[177] White Paper on Damages actions, supra note 137, at para. 2.1.

efficiency in *Illinois Bricks* is unlikely to be replicated within the EU system.[178] Particularly for reasons of fairness, all victims could therefore have the opportunity to bring damages actions.[179] Thus, the duty under Articles 81 and 82 EC not to infringe EC competition law should be owed not only to the direct purchaser in a supply chain but also to the subsequent members of the chain if they can be affected by competition infringements.[180]

To ensure effective private competition enforcement, harmonization of either national substantive standards regarding the passing-on defence and indirect purchaser standing is desirable for an effective private enforcement in the EU. US experience regarding passing-on defence and indirect purchaser standing illustrates that cooperation mechanisms amongst the courts applying those standards are inevitable for an effective private enforcement. As I already discussed above,[181] in the lack of solid mechanisms of cooperation, the result will either be forum shopping raising risks of inconsistency and multiple recoveries, as the US experience illustrates.[182]

5.5 Indirect Purchaser Litigation in the UK

5.5.1 The Relationship between the Standing of Indirect Purchasers under Tort law and the Standing of Indirect Purchasers under the Competition Act 1998

In the UK there is no specific rule that applies to the standing of indirect purchasers in competition law claims. The rules on standing depend on the tort which is to be pleaded as a cause of action.[183] English tort law requires *damnum*

---

[178] Gregory P. Olsen, "The Changing Face of Class Action Litigation: The Class Action Fairness Act Development International Development - Enhancing Private Antitrust Litigation in the EU", Antitrust, 2005, p. 74.
[179] "Response to Green Paper-Damages actions for breach of the EC antitrust rules", BAK Position Paper, 2006, p. 6.
[180] L. R. Tolaini and A. M. Morfey, supra note 7, p.94.
[181] See section 2.2.4 which deals with harmonization of different national laws in the EU.
[182] See e.g. Francis G. Jacobs and Thoms Deisenhofer, "Procedural Aspects of the Effective Private Enforcement of EC Competition Rules: A Community Perspective", in "European Competition Law Annual 2001: Effective Private Enforcement of EC Antitrust Law", Claus-Dieter Ehlermann, Isabela Atansiu (Eds.), 2003, Oxford-Portland Oregon, 187-252; Firat Cengiz, supra note 12, p.41.
[183] OECD Directorate for Financial and Enterprise Affairs Competition Committee, "Roundtable discussion on private remedies: Passing on defence; Indirect purchaser Standing; Definition of Damages

and *iniuria* to be united in the same person, which means that damage suffered in consequence of an act may not be eligible for compensation if the plaintiff such as the indirect victim was not the person to whom the wrongfully acting defendant owed the duty he infringed.[184] The tort of breach of statutory duty arises when a court concludes that a statute primarily regulatory or criminal in nature should be treated as giving rise to civil liability. There appear to be two rules limiting 'standing' in actions for breach of statutory duty. First, the statutory duty must be owed to the plaintiff or the plaintiff must fall within the class of persons that the statute intends to protect. Second, the plaintiff must have suffered injury of the kind which the statute is intended to prevent. If the statute is intended to prevent a mischief of a particular kind, a person who suffers loss of a different kind cannot recover its loss in an action for breach of statutory duty.

The approach is the same in relation to the standing of indirect purchasers in competition area. The prevailing view appears to be that breach of the competition law prohibitions may amount to the tort of breach of statutory duty.[185]

There is no reason to believe that an indirect purchaser in a competition case would be unable to satisfy two rules referred to in the previous paragraph.[186]

Above all, whether or not UK tort law rules can limit or bar indirect purchaser actions will be dependent upon their being compatible with the Community principles of equivalence and effectiveness.[187]

---

of United Kingdom", OECD Working Paper, 2006, p. 2.

[184] Heuston, R. F. V. / Buckley, R. A. "Law of Torts", 21st ed., London 1996, p.508.

[185] The Court of Appeal in *Devenish v Sanofi* treated it as breach of statutory duty. See, *Devenish Nutrition Limited v. Sanofi-Aventis SA (France) and others*, Case A3/2008/0080, [2008] EWCA Civ 1086[Arden] , at paras 1~2.

[186] OECD Directorate for Financial and Enterprise Affairs Competition Committee, "Roundtable discussion on private remedies: Passing on defence; Indirect purchaser Standing; Definition of Damages of United Kingdom", OECD Working Paper, 2006, p. 2.

[187] Alison Jones and Brenda Sufrin, "EC Competition Law", 3rd ed., Oxford, 2007, p.1337. For the principles of equivalence and effectiveness, see section 3.2.2 which deals with current situation of compensatory, punitive or exemplary Damage in the EU.

5.5.2. Standing of Indirect Purchasers under the Competition Act1998

As explained above,[188] in the UK there is no specific rule for indirect purchaser's standing in competition area. As explained in Chapter 2,[189] the Competition Act 1998 contains provisions on monetary claims before the Competition Appeal Tribunal (CAT). Section 47A of the Competition Act 1998[190] provides that a person who has suffered loss as a result of the infringement of Articles 81 or 82 EC or their domestic equivalents, the Chapter I and Chapter II prohibitions, may make a claim in proceedings before the CAT if the infringement has already been established by a decision of the OFT, the CAT itself, or the European Commission.

As also explained in Chapter 2,[191] the Competition Act 1998 provides for representative consumer claims. A consumer claim is defined in section 47B(2) as a 'claim to which section 47A applies which an individual has in respect of an infringement affecting (directly or indirectly) goods or services to which subsection (7) applies'. Subsection 7 provides: 'This subsection applies to goods or services which - (a) the individual received, or sought to receive, otherwise than in the course of a business carried on by him (notwithstanding that he received or sought to receive them with a view to carrying on a business); and (b) were, or would have been, supplied to the individual (in the case of goods whether by way of sale or otherwise) in the course of a business carried on by the person who supplied or would have supplied them'.

Section 47B (6) sets out who constitute consumers for these purposes. It states that a consumer is an individual who received goods or services, or sought to receive them.[192] The definition of consumer in the section 47 B is broad. Maybe even indirect purchasers that would encompass consumers can be enclosed in this

---

[188] See section 5.5.1 which deals with the relationship between the standing of indirect purchasers under Tort law and the standing of indirect purchasers under Competition Act 1998.
[189] See section 2.3.1 which deals with development of competition law in the UK.
[190] Inserted by section 18(1) of the Enterprise Act 2002.
[191] See section 5.5.1 which deals with the relationship between the standing of indirect purchasers under Tort law and the standing of indirect purchasers under Competition Act 1998.
[192] In this context, business is defined in s.47B(8) as including (a) a professional practice; (b) any other undertaking carried on for gain or reward; (c) any other undertaking in the course of which goods or services are supplied otherwise than free of charge.

broad definition. Thus, indirect purchasers would be entitled to claim under UK law,[193] subject to satisfying the requirements of causation and remoteness.[194]

The UK courts do not deny standing to indirect purchasers and indeed it appears that such a denial would be incompatible with EC law and contrary to the principles of direct effect and effectiveness. As discussed above, [195] the ECJ stated in *Courage v Crehan*[196] that any individual could pursue a private action for breach of competition law. Indirect purchasers actions are recognized as desirable in the OFT Discussion Paper.[197]

In respect to indirect purchaser actions, the crucial case in the UK is *Emerald Supplies Ltd & Anr v. British Airways Plc.* This case arose from an alleged price fixing agreement in the air freight services market between British Airways (BA) and a number of other international airlines, including Korean Airlines.[198] BA and Korean Airlines made a plea agreement with the US Department of Justice in July 2007 by which they agreed to plead guilty and pay criminal fines totalling $600 million in respect of fixing the rates charged to customers for international air shipments of cargo.[199] The European Commission sent a Statement of Objections to various airlines, including BA, in respect of their alleged participation in an air freight cartel, in December 2007.[200]

In September 2008 the plaintiffs instituted proceedings against BA seeking damages for those infringements. The plaintiffs import cut flowers from, respectively, Columbia and Kenya. For that purpose they use the air freight services of the defendants British Airway (hereafter, BA) and other international airlines. They brought damages actions on behalf of the direct or indirect purchasers and

---

[193] See Van Dijk and Niels, "The Economics of Quantifying Damages", C.L.J. 69, 2002, p. 74. "arguably only a party that suffers an injury that competition law was designed to prevent should be allowed to claim damages". If direct purchasers pass on overcharged price to indirect purchasers, they are real victim from anticompetitive conduct. Thus, indirect purchasers should be allowed to claim damages for loss.

[194] In respect to forseeability in English law, this context, the courts/CAT will decide whether to apply the *Polemis* test in *R. v Thames Magistrates' Court ex parte Polemis*, [1974] 1 WLR 1371 case based on damage directly caused or the *Wagon Mound* basis in *Morts Dock& Engineering Co v Overseas Tankship(UK) Ltd*, [1961] A.C. 388 case of liability for losses which are reasonably foreseeable.

[195] See section 5.4.2 which deals with desirability of permitting indirect purchaser litigation in the EU.

[196] Courage Limited v Bernard Crehan, C-453/99, para 26.

[197] The Office of Fair Trading, supra note 95.

[198] The others included Air France, Cathay Pacific, Japanese Airlines, KLM, Qantas and SAS.

[199] Available at http://www.usdoj.gov/atr/public/press_releases/2007/224928.htm

[200] Case COMP 39.258, Airfreight, MEMO/07/622.

asserted the inflated prices.

In that case the plaintiffs claimed the direct or indirect purchasers should have compensation for loss caused by price-fixing of the fuel surcharge.[201] They insisted that the direct or indirect purchasers including the plaintiffs, had suffered losses under one or more of the following three heads:

i) the inflated element of the price, in so far as it was passed on to them, and/or] ii) loss of sales volume in so far as in the inflated price was passed on by them to their own by them to their own buyers, and iii) loss of sales volumes of other products as a result of brand damage.

The claim was not limited to direct or indirect purchasers of air freight services from British Airways (hereafter, BA). It extended also to the direct or indirect purchasers of air freight services from any other airlines which were party to this price-fixing cartel.[202]

It is submitted that this case recognized the right of indirect purchaser actions because the class was described by the court as "direct and indirect purchasers of air freight services the prices for which were inflated by the agreements or concerted practices." [203]

The Court of Appeal stated that:

"Whether or not an individual member of the class can establish that necessary ingredient will depend on where in the chain of distribution he can and who if anyone in that chain had absorbed or passed on the alleged inflated price."[204]

It also stated that:

---

[201] This case is significant private actions in the UK.
[202] *Emerald Supplies Ltd v. British Airways Plc*, IHC 46/09,[2009]EWHC 741(Ch) at paras. 2-7.
[203] Ibid., at paras 3-4.
[204] Ibid., at para 36

"..[t]he conflict between different members of the class is not a consequence of any esoteric defence of 'passing on' but is inherent in damage being a necessary ingredient in the cause of action. That this is so in apparent from the judgments of Tuckey and Longmore LJJ in *Devenish Nutrition Ltd v Sanofi-Aventis SA*..." [205]

The OFT in its Discussion Paper also indicated that it would not seem appropriate if there is any limitation on the standing of consumers and other end users to bring a competition claims as such limitations possibly have the unintended consequence of discouraging private actions.[206] This Discussion Paper states that:

"Consumers and business suffering losses as a result of breaches of competition law should be able to recover compensation, both as claims for damages on a standalone basis as well as in follow-on cases brought after public action."[207]

It is worth noting that in respect of the prevention of over-compensation the UK section of the *Ashurst Report* stated that:

"Direct purchasers should be encouraged to claim against the infringer for all losses that they have not been reasonably able to mitigate.... However, the direct purchaser should be under a duty to prove that he will not be unjustly enriched by identifying all customers to whom he has passed on his potential loss caused by the infringer and to notify these indirect purchasers so that their claims against the direct purchaser may be joined to the direct purchaser's claim. In this way, the Court can either order damages to be paid by an infringer by reference to the direct loss proved to have been caused by the infringement for each class of purchasers, or the whole loss could be ordered to be paid to the direct purchasers, with a second order requiring the direct purchaser to meet the claims of the indirect purchasers."[208]

---

[205] Ibid., at para 37; *Devenish Nutrition Limited v. Sanofi-Aventis SA (France) and others*, Case A3/2008/0080, [2008]EWCA Civ 1086, para147. See section 4.5.2 which deals with rationale of permitting passing on defence.
[206] OFT 916, supra note 95, pp. 37-39.
[207] Ibid., p.4.
[208] Council Regulation (EC) No.1/2003 at p.24 of the UK report. This is the 'second model' that I discuss towards the end of the Korea section.

This is an interesting idea because in this way the defendant would compensate the direct purchasers for all losses that have occurred and then the direct purchasers would compensate the indirect purchaser for the damage they suffered. Thus, real victims such as indirect purchasers would be compensated through the court's second order.

5.6 Conclusion on the application of the Indirect Purchaser Actions in Korea

It has been see from the discussion in this Chapter whether to permit indirect purchasers actions or not is closely related to both public policy goals such as ensuring fair and just compensation and effective and efficient enforcement through redressing indirect purchaser loss.

If all indirect purchasers brought damages actions, there would be a number of complications in ascertaining, apportioning and distributing the loss resulting from the infringement.

To avoid these problems and to ensure effective enforcement, in *Hanover Shoe* case, the US Supreme Court prohibited passing on defence. To prevent multiple liabilities, the Supreme Court later decided that denying passing defence entailed prohibiting the passing on *offence*, i.e. indirect purchaser actions. However, it has been strongly argued that there is insufficient compensation and deterrence in the US because of *Hanover Shoe*[209] and *Illinois Brick*[210] decisions.

Therefore, it is necessary to determine the appropriate balance that should be achieved in Korea between fairness (by providing the right of any individual to claim damage) and effectiveness by paying close attention to the experience in the US.

---

[209] *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*, 392 U.S 481(1968).
[210] *Illinois Brick Co. v. Illinois*, 431 U.S. 720(1977)

As I already mentioned above,[211] it is not easy for indirect purchasers such as consumers to bring damages actions because the chain of victims can be very long and the damage of indirect purchasers can be small and disperse. However, it is submitted that effective and efficient private damage actions must provide a remedy for the all victim of the anticompetitive conduct because the more indirect purchasers bring damages actions, the more effective the competition system will be. Damages actions for indirect purchasers against the infringements of competition law have also a strong fairness aspect through compensating real victims for damage. Any right of actions for damage must be shaped to ensure the remedy for indirect purchasers such as consumer in order to avoid the danger of significant injustice.[212] As I already discussed,[213] there is no valid reason in principle to deny compensation to indirect purchasers.

If indirect purchasers' actions were not allowed in Korea, it does not correspond to the principle of full and just compensation under civil law and competition law in Korea because the damaged party would have no redress in damages. Even if there have been no cases in which the Korean courts ever accepted this position there is no reason why indirect purchasers should not benefit from actions for damages. If the indirect purchasers are able to prove that the damage has been passed on to them indirect purchasers should have the right to bring damages action. Therefore, to ensure full and just compensation, it is submitted that no limitation should be placed on the categories of persons who can recover damages. Indirect purchasers could include competitors, consumer or other market participants that participated in the infringement but suffered loss. The only limit should be that those who entitled to recover must be persons with damage caused by anticompetitive conduct.

Given the above reasons of full compensation, protection of consumers' interests and ensuring efficient and effective enforcement, it is highly probable that Korea will recognize indirect purchaser actions under the rules of damages of the

---

[211] See section 5.2.3 which deals with rationale of decision of Illinois Brick.
[212] William H. Page, "Policy Choices in Defining the Measure of Antitrust Damages", DAF/COMP/WP3, 2006, p. 5.
[213] See section 5.3.2 which deals with principles of permitting indirect purchaser actions in Korea.

competition law and civil law.

Recognizing indirect litigation would confer a significant advantage over the US system because in the US indirect purchasers such as final consumers are not entitled to seek damages, at least before the federal courts.

If indirect purchaser actions are allowed, it is necessary to decide how to measure the effects of the overcharge along the distribution chain. In respect to indirect purchaser actions, there is a high probability that it is difficult to calculate the amount of damage of indirect purchasers especially, when their damage is small and diffused. However, what seems inappropriate is the rule that limits the right of indirect purchaser on the assumption that identifying the effects further down the distribution chain is always complicated and inaccurate.[214] With the availability of sophisticated econometrics and statistical analyses and the growing familiarity and acceptance of these techniques by the courts, it is not too difficult to calculate the amount of damage even if is small and dispersed. To ameliorate the difficulty of quantification of damage, specific rules for allocating recoveries between direct and indirect purchasers must be enacted to streamline probably complicated process. These rules should be based on fairness and efficiency in compensating victims and remedying wrongs in predictable ways.

As I already explained,[215] however, victims will rarely, if ever, bring a damage action individually when they have suffered scattered and small damage. In order to avoid these victims remaining uncompensated, the burden of proof in respect to passed on damage should always lie with the defendant. It is worth considering that European Commission's White Paper recognized presumption that the overcharge has been passed on in its entirety to their level.[216]

In order to avoid these victims remaining uncompensated, it is also necessary to ensure mechanism of consolidation of the numerous claims for damages. If

---

[214] Carlo Petrucci, supra note 25, pp.36-37.
[215] See section 5.2.3 which deals with rationale of decision of *Illinois Brick.*
[216] White Paper on Damages actions, supra note 137, at section 2.6; See also section 5.4.2 which deals with desirability of permitting indirect purchaser litigation in the EU.

indirect purchaser actions were consolidated and shown to be capable of being managed and heard without undue complexity, it is beneficial to public interests such as the consumer interest. This approach corresponds best to the deterrent function as well as compensatory function of the damages actions.[217]

[217] In respect to group actions, see Chapter 6 which deals with group actions.

Chapter 6. Group Actions

6.1 Overview of Group Actions

6.1.1 Introduction of Group Actions

In a mass producing and consuming society, anticompetitive conduct can result in a great many natural or legal persons suffering some loss because one product or service can cause loss to a large number of natural or legal persons. Many individuals, especially those whose losses are small can be discouraged from going to court because they believe the process is too difficult or because the potential costs outweigh their own individual loss even though the aggregate loss to consumers or business at large may be very significant.[1] Thus, some mechanisms such as group actions are necessary. Group actions can improve the situation of the plaintiffs by making the cost /benefit analysis of the litigation more attractive by reducing the costs and sharing the evidence.[2] Economies of scale may be realized when claims are aggregated, both for the courts and litigants since a single judge can consider all of the issues and litigants' average costs of representation will decrease as the number of fellow plaintiffs' increases.[3] Competition law is a field where group actions can significantly enhance the victims' ability to access to justice and obtain compensation.[4]

Group actions are particularly valuable in the protection of consumers' interests, particularly in relation to indirect purchasers' claims (subject to satisfying the requirements of causation and remoteness)[5] by embracing a whole class of

---

[1] The Office of Fair Trading, "Private Actions in Competition Law: Effective Redress for Consumes and Business", OFT916, 2007, p.13; See also Fed. R. Civ. P. 23(b)(3) advisory committee's note (suggesting that a class action is appropriate when "the amounts at stake for individuals are so small that separate suits are impracticable"); Richard Posner, "Economic Analysis of Law", (5th ed.),1998, p.626 (noting that the class action is "most needed" when "the individual claim is very small").

[2] Rainer Becker, Nicolas Bessot and Eddy De Smijter, "The White Paper on damages actions for breach of the EC antitrust rules", European Commission Newsletter, ISSN 1025-2266, 2008, p.7.

[3] OFT 916, supra note 1, p.21.

[4] European Commission, "Commission Staff Working Paper accompanying the White Paper on Damages actions for breach of the EC antitrust rules", SEC (2008) 404, p. 4.

[5] For instance, in Korean law, remoteness appears generally to constitute some combination of the directness and foreseeability of the damage caused. Foreseeability appears to limit liability on the basis of

interested persons and ensuring a fair and equal allocation of rights or burdens.[6] Therefore, it can be argued that to protect consumers' interests, the various group actions rules and procedures have to be addressed in order to provide properly for any damages actions by consumers.

Furthermore, the threat of group action liability may provide a powerful deterrent effect that can offer widespread benefits because group actions allow more than just a small number of victims to bring damages actions.[7] Where there are group actions procedures, a competition infringer cannot believe that the anticompetitive effects of its conduct are so diffuse that no one would bring a damages actions.[8]

In this chapter, I will discuss group actions to encourage private enforcement in the US, Korea, EU and UK.

6.1.2 Definition of Group Actions

There are many different kinds of group actions such as class, representative, collective, and joint actions. However, according to the Ashurst Report, the study on damages actions prepared for the European Commission in 2004[9] group actions can be defined as below.

Class actions can be defined as a civil court procedure under which one party,

---

the predictability of certain aspects of the damage caused by the defendant such as the (type of) damage or the extent of the damage.

[6] Romanian Competition Council, "Public consultation on the Green Paper-Damages actions for breach of the EC antitrust rules", Position of the Romanian Competition Council, 2006, p. 11; Neelie Kroes, "Reinforcing the fight against cartels and developing private antitrust damage actions : two tools for a more competitive Europe", Commission/IBA Joint Conference on EC Competition Policy, Speech/07/128, Brussels, 2007, available at http://europa.eu.

[7] Paul Friedman, David Gelfand and Christina Nordlander, etc., "Comments of the Section of Antitrust Law and the Section of International Law of the American Bar Association in Response to the Request for Public Comment of the Commission of the European Communities On Damage Actions for Breaches of EU Antitrust Rules", ABA, 2006, p. 45.

[8] John H. Beisner, Charles E. Borden, "Expending Private Cause of Action: Lessons from the US Litigation Experience", presented at The Trans-Atlantic Challenge: Diverging approaches to regulatory and legal reform in the Untied States and Europe, Brussel, 2005, p. 22.

[9] Ashurst Report, "Study on the conditions of claims for damages in case of infringement of EC competition rules", 2004, p.43.

or a group of parties, may bring actions as representatives of a larger class of unidentified individuals.[10]

Representative actions can be defined as claims made by, or defended by, a representative or representative organization on behalf of a group of individuals who may, or may not, be individually named in a situation where an individual would have a direct cause of action.[11] There are two types of representative action. One is where one plaintiff brings the action as the representative of the group and the other is where an organization, firm etc brings an action on behalf of the group.[12]

Collective actions can be defined as single claim brought on behalf of a group of identified/identifiable individuals. Any award resulting from the action will be made to the group as whole.[13]

Joint actions can be defined as set of claims brought by several plaintiffs together or joined by the judge hearing the claims due to some link between them (e.g. the same defendant, damages resulting from same facts). This type of action differs from other group actions because each group litigant is a member of a procedural class as a party, rather than as a represented non-party. Although a single judgment may be made covering the cases of all the plaintiffs, the plaintiffs' claims will be treated separately within that judgment and awards will be made individually to the different plaintiffs.[14]

Above all, although group actions are different each other in some points, these actions may be available when plaintiffs are pursuing a common defendant and pursue the same remedy. In respect to these group actions, there are two types of standing. The one is an opt-in system and the other is an opt-out system.

---

[10] Ibid. ; Andrew Lockley, "Regulating Group Actions", 139 New L.J. 798, 1989 available in LEXIS, UKJNL Library, NLJ File.
[11] Ashurst Report, supra note 9, p.43
[12] For example, see UK Competition Act 1998 s 47B.
[13] Ashurst Report, supra note 9, p.43.
[14] Ibid.

An opt out system is where the class member is bound by the resolution of the class actions unless a class member choose to opt out of the class.[15] Members of the class may exclude themselves from the proceedings if they expressly opt-out. Only the class members who opt out are not bound by the judgment in the case. This opt-out system allows potentially thousands of plaintiffs to be conscripted into class actions unknowingly.

The opt-in group action system is where the victims have to express their intention to be included in the action.[16] The key difference from an opt-out system is that an individual must choose to participate and expressly state their intention to be included in the action before he (or she) will be included in the group action. There is no way for them to be part of the litigation unless they affirmatively choose to do so.

Currently, UK competition law provides for a consumer claim which is an opt-in system. However, it is worth noting that the OFT has recommended extending the scope of representative actions by permitting actions to be brought on behalf of consumers at large (that is, both named and as yet unnamed individuals).[17]

6.1.3 Necessity of Group Actions

Individuals could be discouraged from going to court because of two main reasons.

First, individual damage is usually *small and dispersed.*[18] As the US

---

[15] Edward F. Sherman, "American Class Actions: Significant Features and Developing Alternatives in Foreign Legal Systems", 215 F.R.D., 2003, p.146.
[16] R. Becker et al., supra note 2, p.7.
[17] OFT 916, supra note 1, pp.19-20.
[18] Kati J. Cseres, "The impact of Consumer Protection on Competition and Competition law : The Case of Deregulated Markets", Amsterdam Center for Law & Economics Working Paper N0.2006-0, p.4; see also Sven Norberg, "Some Elements to Enhance Damages Actions for Breach of the Competition Rules in Articles 81 and 82 EC", 32nd Annual International Antitrust Law & Policy Conference, Fordham, New York, 2005, p. 26; "Private Actions in Competition Law: Effective Redress for Consumes and Business", OFT Discussion paper/OFT916, 2007, p. 8; John Pheasant, "Private Antitrust Damages in Europe: As the policy debate rages, what are the signs of practical progress?", Business Law International Vol8, 2007, p.234; Thomas Lampert and Georg Weidenbach, "Antitrust Litigation in Germany", CLI 4.12(3), 2005, p.3.

Supreme Court pointed out in *Hanover Shoe*,[19] an individual rarely has a sufficient interest in bringing damages actions because they would only recover damages based on the small amount of overcharge passed on to them.[20]

Second, costs, delays and other burdens involved in ordinary judicial proceedings can discourage individuals who suffer a relatively minor economic loss from seeking a judgment against undertakings engaging in anticompetitive conduct.[21] Usually, competition cases are expensive and involve complex argument and/or specialised evidence that is beyond the resources of individuals and it is improbable, although not impossible, that the victims can bring damages actions without sharing the risks and costs associated with the action.[22] It would not be economically efficient for each individual to pursue his (or her) claims against the defendant through litigation although the overall aggregate sum might be large.

However, there will be problems in ensuring effective competitive markets if competition rules can not be effectively enforced. The crucial issue is that if consumers cannot enjoy their rights then business has less incentive to obey the rules. Infringers who break the law can escape paying compensation and gain an unfair advantage over their fair dealing competitors.[23]

Furthermore, an important principle of access to justice is that potential plaintiffs should not be denied access to the courts because they do not have the means to litigate. Namely, lack of means should not disqualify potential plaintiffs from taking actions. In particular consumers and SMEs[24] with small value claims

---

[19] *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*, 392 U.S. 481(1968), p. 494; See also section 4.2 which deals with passing on defence in the US.

[20] Jeremy Lever QC, "Effective Private Enforcement of EC Antitrust Rules Substantive Remedies: The Viewpoint of an English Lawyer", in 「European Competition Law Annual 2001: Effective Private Enforcement of EC Antitrust Law」 ed. by Claus Dieter Ehlermannn & Isabela Atanasiu, Hart Publishing, 2003, p.111.

[21] European Parliament resolution of 26 March 2009 on the White Paper on damages actions for breach of the EC antitrust rules (2008/2154(INI)) at para 4; Paolo Giudici, "Private Antitrust Law Enforcement in Italy", 1 Competition Law Review 61, 2004, p. 80-81; Michele Carpagnano, "Private Enforcement of Competition Law Arrives in Italy: Analysis of the Judgment of the European Court of Justice in Joined Cases C-295-289/04 *Manfredi*, ", 3(1) The Competition Law Review 47, 2006, p.69; OFT 916, supra note 1, p.13.

[22] Commission Staff Working Paper accompanying the White Paper, supra note 4, para.16.

[23] See section 6.1.1 which introduces group actions; See section 5.1 which deals with the Importance of indirect purchaser litigation.

[24] As I already noted in section 2.1.2. 1 which deals with the role of the KFTC, in Korea, according to Article 2, Act on Small and Medium Size Enterprise, an SME is an undertaking with less than 200

need better access to justice, and should have the possibility to group their claims.[25]

To enable consumers to bring actions it is therefore widely argued that some facilitating instruments such as group actions must be considered.[26] Group actions help to address the problems above, particularly given the economies of scale that may be realized.[27] Group action procedures could offer significant benefits to the litigants and to the judicial system as a whole.[28]

As far as group actions are concerned, however, it is submitted that generally speaking, there is also a danger of abuse of litigation because they can encourage legal actions by lowering cost and raising benefit. For instance, as I discuss below, the US has significant problem of abuse of litigation caused by strong incentives to litigate such as opt-out class actions.[29] However, these problems are not limited to the US. There is a possibility that other jurisdictions such as Korea could also develop problems such as abuse of litigation. Thus, it is desirable to keep a balance between encouraging legal actions and preventing abuse of litigation. The key question is how to improve access of justice and to avoid imposing unnecessary costs on potential defendants and the judicial system. It is important to design specific features in order to serve as effective safeguards against misuse of group actions.

---

employees. For the definition of an SME in the EU see Commission Recommendation of 06/05/2003 on the definition of micro, small and medium-sized enterprises [2003] OJ L 124.

[25] Sweet & Maxwell Limited and Contributors, "Commission Presents Paper on Compensating Victims of Competition Breaches", EU Focus 231, 2008, p.2.

[26] R. Becker et al., supra note 2, p.7; Antonio Capobianco, "Civil Actions---Europe---Private Antitrust Enforcement of EC Competition Rules: Recent Development", CLI 25(3), 2004, p.5; "Comments of the Section of Antitrust Law and the Section of International Law of the American Bar Association in Response to the Request for Public Comment of the Commission of the European Communities On Damage Actions for Breaches of EU Antitrust Rules", April, 2006, p.53-54; Clifford A. Jones, "Private Antitrust Enforcement in Europe: A Policy Analysis and Reality Check", 27(1) World Competition 13, 2004, p.15.

[27] OFT 916, supra note 1, p.13.

[28] See generally, Stephen Calkins, An Enforcement Official's Reflections on Antitrust Class Actions, 39 Ariz. L. Rev. 413, 1997, p. 437-445.

[29] See section 6.5.2 which deals with problems created by the class actions in the US.

6. 2 Group Actions in Korea

6.2.1 Overview of Consumer Policy and Current Situation of Group Actions in Korea

6.2.1.1 Overview of Consumer Policy in the KFTC

Since the development period of the 1960s and 1970s, Korea has pursued a 'producer-oriented economic policy' of supporting and fostering various industries under the leadership of the government.[30] Meanwhile, consumer policy has only been recognized as a collateral part of the industrial policies, and has been mostly focused on ex-post remedies for consumer damage. However, there has been a need to transform consumer policy in order to recognize consumers not as subjects of protection but as independent and responsible market players. This is because, with the growth of the economy, the role of consumers as the final judge of the competition among producers has increased. This is a result of the change in Korea's economic growth pattern from development reliant on government support to development driven by market efficiency.

In the light of the need of the changed role of consumers, the consumer policy paradigm has shifted from approaching consumer issues from regulatory perspective to approaching problems within the framework of market principles with an emphasis on consumer rights. It is necessary to create a market environment where consumers can make reasonable purchases with increased capacity.[31]

As I have already discussed in Chapter 1, the competition law system has been seen as an integrated system of consumer law system and the common aim of competition law and consumer law is to ensure consumer welfare.[32]

6.2.1.2 Current Situation of Group Actions in Korea

The prevailing civil redress procedures are based on an individual system – a

---

[30] See section 2.1.1 which deals with competition culture and private competition enforcement in Korea; See also Section 1.2.2.1 which deals with objectives of competition law in Korea.
[31] KFTC Annual Report 2008, 2009, p.322.
[32] See section 1.2.2.1 which deals with objectives of competition law in Korea

victory for one plaintiff does not apply to others similarly affected. Any judgment obtained can only be enforced against a person who is a direct party to the proceedings. They can be individually reimbursed for a wrong done to them.[33] The principal Korean jurisdiction has traditionally avoided US class actions as described in section 6.4. However, Civil Procedural Law has already provided for joint actions. These actions allow individuals to band together to claim damages where it would not be cost-effective for each to pursue their own. They are litigation brought jointly by two or more individuals who have common interests and are pursuing the same remedy However, joint actions, are not usually suitable for numerous consumers because these actions are not treated as an entity. With joint actions individuals obtain compensation individually even if each action is joined to proceed together. In the absence of group action mechanisms such as representative or class actions, consumers are not able to bring damages actions to recover damages which may be individually minor but collectively major. In particular, competition damages actions may need complex analysis by economic experts, which could result in legal actions being very costly. It is unlikely that legal or natural persons with small claims would bring damages actions for breach of competition law without group actions.

Given competition cases need often complex economic analysis which could increase litigation costs, it is worth considering the cost rules in group actions. The basic Korean costs rule under civil actions is the upfront and loser pays rules.[34] Under the upfront and loser pays rules, each party has to pay its legal costs and the losing party has to bear not only its own but also the costs of the other party. The winning party will recover a substantial part of its costs of perhaps hundreds of thousands of Wons.[35] This rule is applied to all forms of civil proceedings, not just competition litigation.[36] This differs from the situation in the US, where in antitrust cases there is a special rule that enables plaintiffs to get their costs if they win the action but are not required to pay the defendants' costs even if the action is successfully defended. This is called the one-way cost rule. In Korea, this one-way

---

[33] Civil Law 750(Damages actions for illegal behaviour)
[34] Civil Procedure Law 98(Principle of litigation cost)
[35] Won is Korean Currency. £ 1≒2,023Won(at July 31, 2009)
[36] Civil Procedure Law 98(Principle of litigation cost)

cost rule and contingent fee arrangements providing for the lawyers representing a plaintiff to receive a proportion of the damages awarded are not permitted.

In Korea, the right to act collectively in response to a power-wielding commercial player has been recognized. For instance, Korea passed the Securities Class Action Law in 2004, which provides for class actions for damages by shareholders to prevent illegal activity such as stock price manipulation. Under the Securities Class Action Law a large number of shareholders are treated as an entity when bringing damages actions against the illegal practices of a stock-issuing company.[37] Any shareholders who suffered financially can bring actions against illegal practices in financial market. The shareholders concerned have to be identified. The award resulting from any such action can be made to person who brought the action. [38]

6.2.2 Competition Group Actions in Korea

In order to defend consumer interests in the competition area, the KFTC made provision for group actions which has been adopted by the legislature on January 1 2007 under the Consumer Fundamental Act. Under Article 70 of the Consumer Fundamental Act, consumer protection bodies such as consumer organizations can bring a group action on behalf of consumers with similar interests.[39] It is a *representative action* because only representative organizations such as a consumer organization can bring actions. It is submitted that these actions are advantageous to consumers because of their group strength, knowledge and expertise. These consumer actions will be useful in cases where the wider public has been harmed by infringers because the sum of the individual consumers' damage may be substantial.

A representative action system can only operate successfully if the bodies permitted to bring such actions are credible and reputable. According to this Act, to pursue a claim, a body should be established specifically subject to appropriate

---

[37] Securities Class Action Law 2.
[38] Securities Class Action Law 39-43.
[39] Consumer Fundamental Law 70

safeguards and should be required to meet objective, transparent and non-discriminatory requirements. [40] The criteria for designation are good reputation for the well-being of consumers and the ability to handle a case. Designated bodies should be required to seek approval from the court before formally bringing a representative action.[41] Only pre-approved entities are capable of initiating such group actions. The courts should decide in each case whether a consumer organisation is suitable to bring representative actions, based on criteria set out in legislation.[42] The reason that Korean law provides for representative actions is the recognition that expert organizations such as consumer organizations will more readily start legal actions against competition law infringers than individual consumers or small businesses. However, to ensure that the public interest as well as the individual interest is served, only non-profit making organization such as a consumer association can bring representative actions.[43]

As far as group actions are concerned, the key question is why Korea adopted representative actions not class actions. It is worth considering the difference between Korean representative actions and US class actions because the US has a long history of class actions.[44] Korean representative actions and US class actions share common essential features because each makes available remedies to a number of litigants with a common loss against a common infringer in circumstances where there are questions of fact and/or law common to all the individual claims. However, the Korean representative actions differ from the US class actions. The substantial difference is that a representative action is brought by a body authorised to bring a representative claim based on pre-determined criteria and does not allow *opt-out* arrangements such as in US class actions .[45] In Korea, the members of representative actions must be individually named whereas in the US, class actions are *opt-out arrangements.* Owing to this opt-out arrangement, the US class action can be unmanageable because it can include very large numbers of

---

[40] Consumer Fundamental Law 70
[41] Consumer Fundamental Law 73
[42] Consumer Fundamental Law 74
[43] Consumer Fundamental Law 70
[44] I will discuss US class actions in section 6.5.
[45] As I already discussed, an opt-out arrangement is the system under which all potential plaintiffs are included unless they expressly opt out: See section 6.1 which defines opt –out system.

class-members.[46] The management of large numbers of plaintiffs in the same action has to be a paramount aim of any mechanism in any kind of group actions. If the action becomes unmanageable, it loses its superiority to individual actions.[47] In terms of manageability, by involving an organizationally strong association and by adopting an opt-in mechanism, the Korean representative action could avoid the obvious risk of making group actions unmanageable such as US class actions by allowing opt-in representative actions. However, it can be argued that opt-in actions are simply not as effective as opt-out systems because there is no perfect way to notify every victim of the suit. Furthermore, opt-in collective action can make the litigation complex by requiring the identification of the plaintiffs and the specific harm suffered. An opt-out collective action can be more efficient in terms of corrective justice and deterrence by including a wide number of victims.

One of the most important points to note about the Consumer Fundamental Act is that it limits the remedies in representative actions to those dealing with the defendant's conduct, such as injunctive relief and does not include monetary claims. Injunctive relief provides an efficient means of ensuring the maintenance of a competitive market insofar as it provides private litigants with the opportunity to put a stop to ongoing harms of anticompetitive conduct. Injunctive relief allows a legitimately threatened party to compel adherence to the competition laws. However, victims of anticompetitive conduct can have financial compensation only if they can bring civil damages actions. If representative actions do not allow for compensation in the form of damages, individuals or SMEs will not normally obtain compensation because, as discussed above,[48] their damage is usually too small to bring damages actions individually. Therefore, it is submitted that it is necessary for Korean representative actions to provide for damages actions as well as injunctive relief because only the courts, not the competition authorities can order compensation. If damages actions are allowed, there is a possibility many private parties bring damages actions for monetary gain.

Moreover, alongside representative actions, it is submitted that in order to

---

[46] John H. Beisner and Charles E. Borden, supra note 8, p. 5.
[47] Sullivan, L. A., "Handbook of the Law of Antitrust", St. Paul, 1977, p. 779.
[48] See section 6.1.3 which deals with necessity of group actions.

protect the consumer interest, it would be desirable for the empowered consumer body to also have power to complain to the KFTC. At present the Consumer Fundamental Act does not provide for a consumer body's right to complain to the KFTC.

6.3 Group Actions in the EU

6.3.1 Overview of Group Actions in the EU

It is now generally accepted that it is unlikely that the modernisation of EC competition law[49] will encourage private damages actions unless potential plaintiffs such as consumers can seek redress for damages suffered. The European Commission has recognized the necessity of group actions for small-value claims arising from breaches of competition law by consolidating a large number of smaller claims into one action.

The European Commission noted in its Green Paper and White Paper on Damages Actions[50] that small-value claims arising from breaches of competition law were most unlikely to be brought, and hence, "collective actions can serve to consolidate a large number of smaller claims into one action".[51]

Within the EU, however, there are different approaches amongst the Member States towards how to handle multiple plaintiff cases, and some Member States of the EU recognize multi-party legal actions such as representative actions. Different procedural rules of EU Member States' and the lack of general mechanisms to solve these discrepancies can be a crucial obstacle to development of private enforcement in the EU. An efficient and consistent system for bringing group actions is required to facilitate damages claims for breach of competition law.

Given that group action can contribute to public interests such as the consumer interest through improving access to courts, it is desirable national courts to be encouraged to use group actions mechanism under national law at their

---

[49] See section 2.2.3 which deals with substantial changes to encourage private enforcement in the EU.
[50] See section 2.2.3 which deals with Green Paper and White Paper on damages actions in the EU.
[51] European Commission, "Green Paper - Damages Actions for Breach of the EC Antitrust Rules", COM (2005) 672 final, at section 2.5.

disposal in order to achieve optimal enforcement.

US style class actions, however, are not common in the legal systems of the Member States of the EU. [52] Nor are they generally envisaged.[53] There has traditionally been a strong suspicion of US class actions because of the perception that US class actions produce undesirable consequences, such as abuse of litigation as discussed above.[54] Furthermore, within the EU, there are different approaches among the Member States towards the handling of multiple plaintiff cases. The Commission considers that discrepancies in the EU Member States' procedural rules and the general lack of mechanisms permitting group actions may weaken EU consumers' rights which the law is intended to protect from anticompetitive acts, and endanger a more level playing field for businesses.[55] These results have been further exacerbated by the decentralised enforcement of EC competition law under the Modernization Regulation, Regulation 1/2003.[56]

Thus, the Commission has argued that a more efficient system for bringing group actions is required because "facilitating damages claims for breach of competition law will not only make it easier for consumers and firms who have suffered damages ... to recover their losses from the infringer but also strengthen the enforcement of competition law."[57]

---

[52] John H. Beisner, Charles E. Borden, supra note 8, p.4-6; John Pheasant, "Private Antitrust Damages in Europe: The Policy Debate and Judicial Developments", Antitrust, Fall 2006, p.61; Christopher Hodges, "Multi-Party Actions: A European Approach", 11 Duke J. Comp. & Int'l L. 321, 2001, p.346-347 ("Europe neither needs nor wishes to import U.S.-style class action litigation, representing huge, avoidable, and unnecessary cost which distorts the economy . . .").

[53] See, e.g., Edward F. Sherman, supra note 15, p.131 ("Most European countries eschewed American class action practice until quite recently, although some had distinctive procedures permitting expanded standing and aggregation through 'group litigation.'"); see also Christopher Hodges, supra note 52, p.327 ("The first factual observation is that it is only recently that some European jurisdictions have introduced a rule of court procedure on the recognition or management of multi-party actions."); For an overview of the US experience on antitrust class actions see C.G. Lang, "Class Actions and the US Antitrust Laws: Prerequisites and Interdependence of the Implementation of a Procedural Device for the Aggregation of Low-Value Claims", 24(2) World Competition, 2001, P 285.

[54] From 1984 through 2003, the costs of the tort system had increased by 367%, from $67 billion[54] to $246 billion. Tort costs represented only 0.6% of America's gross domestic product ("GDP") in 1950, 1.3% of GDP in 1970,[54] and more than 2% of GDP by 2001, U.S. Tort Costs: 2004 Update, p. 2 (showing the average annual increase in tort systems cost); Christopher Hodges, "Europeanization of Civil Justice: Trends and Issues", Civil Justice Quarterly, 2007, p. 117-118.

[55] Commission Staff Working Paper accompanying the White Paper, supra note 4, Chapter 2(Standing: Indirect purchasers and Collective Redress).

[56] Reg. 1/2003 [2003] OJ L1/1.

[57] European Commission's "Green Paper"(COM (2005) 672 final), supra note 51, n 2.

The ECJ has never objected to national rules providing for such collective rights of action. The possibility of consumer group actions was first raised in the EU context in a Commission paper of 1984.[58] The Commission concluded in this paper that it was not possible to propose binding harmonisation of national mechanisms on collective actions, since there was too much complexity and diversity amongst the national systems.[59]

In 1998, the EU issued the 'European Directive on Injunctions for the Protection of Consumers' Interests' (the 'Injunctions Directive') which required all member nations to adopt laws which provides for the qualified entities to bring actions for injunctions to protect the 'collective interest' of consumers by the end of 2000.[60] This Directive, 98/27 on consumer injunctions, established the right to bring actions by *qualified entities.* It provided that certain consumer associations or independent public bodies such as administrative agencies responsible for protecting the collective interests of consumers should be granted the authority to bring actions on behalf of a specifically defined group of citizens. The citizens of EU Member State can seek injunctions through qualified entities[61] with respect to infringements of national law provisions implementing certain EC consumer protection directives in another Member State. Given the prior absence of representative actions in the EU, generally, this directive represented a significant break with past practice. This directive, however, did not mandate the creation of US style class action laws.

As far as private competition actions are concerned, the European Commission has endorsed the use of collective litigation procedures. It signalled its

---

[58] European Commissions, "Memorandum from the Commission: Consumer redress", COM (84)692, 1984; see also "Supplementary Communication from the Commission on Consumer Redress", COM (87)210, May 7, 1987; Council Resolution of June 25, 1987 on consumer redress, [1987] O.J. C176/2.

[59] Memorandum from the Commission, supra note 58.

[60] Directive 98/27/EC on Injunctions for the Protection of Consumers' Interests 1998 O.J. L 166/51 (May 19, 1998), available online at http://europa.eu.int/comm/consumers/policy/developments/ acce_just/ acce _ just09_en.pdf. The Directive was implemented in the UK by the Stop Now Orders (EC Directive) Regulations SI 2001/1422, replaced by the Enterprise Act 2002 s 217.

[61] Directive 98/27/EC on Injunctions for the Protection of Consumers' Interests 1998 O.J. L 166/51 (May 19, 1998), Article 4.

interest in introducing group actions mechanism across the EU.[62] The Commission observed that if private enforcement were to be effective in advancing consumer interests, then consumers must have access to some form of representative or collective procedure to bring private actions. The Commission referred to the Opinion of A.G. Jacobs in the *Osterreichischer Gewerkschaftsbund* case where he states:

"Collective rights of action are an equally common feature of modern judicial systems. They are mostly encountered in areas such as consumer protection, labour law, unfair competition law or protection of the environment. The law grants associations or other representative bodies the right to bring cases either in the interest of persons which they represent or in the public interest. This furthers private enforcement of rules adopted in the public interest and supports individual complainants who are often badly equipped to face well-organized and financially stronger opponents".[63]

In the Commission Staff Working Paper accompanying the Green Paper, the European Commission expressed an interest in facilitating the enforcement of individuals' legal rights as a means of "bringing European citizens and their associations closer to European laws and policies".[64]

According to the Green Paper, "It will be very unlikely for practical reasons, if not impossible, that consumers and purchasers with small claims will bring an action for damages for breach of antitrust law. Consideration should therefore be given to ways in which these interests can be better protected by collective actions. Beyond the specific protection of consumer interests, collective actions can serve to consolidate a large number of smaller claims into one action, thereby saving time and money."[65]

---

[62] Commission Staff Working Paper accompanying the White Paper, supra note 4, pp.13-14.
[63] *Österreichischer Gewerkschaftsbund v Austria*, Case C-195/98, [2000] ECR I-10497 at para 47.
[64] European Commission, "Commission Staff Working Paper accompanying the Green Paper - Damages Actions for Breach of the EC Antitrust Rules", SEC (2005) 1732 final para.194.
[65] See Green Paper-Damages actions for breach of the EC antitrust rules, COM (2005) 672 final at 2.5. The genesis of the EU's Green Paper was that individuals who have suffered a loss arising from an infringement of the competition provisions of articles 81 and 82 of the EC Treaty have a right to claim damages.

The Commission's effort to encouraging private actions has been strengthened by a 2006 survey which found that 74 % of Europeans would be more willing to defend their rights in court if they could join with other consumers who were complaining about the same thing.[66]

Speaking in Brussels in March 2007, Commissioner Kroes also indicated that the proposals on private enforcement were about protecting "customers and consumers, the small business and individual citizens who foot the bill of illegal behaviour".[67]

Most of all, in the White Paper[68] on damages actions which resulted from the Green Paper and the Commission Staff Working Paper accompanying the White Paper,[69] the European Commission recognizes that the development of a framework for group actions is necessary in establishing a system of private enforcement. Given, it is desirable to achieve optimal enforcement of group actions, it is worth noting that the White Paper says that:

"In case of joint, parallel or consecutive actions brought by purchasers at different levels in the distribution chain, national courts are encouraged to use whatever mechanism under national or Community law at their disposal in order to avoid under- or over-compensation of the harm caused by a competition law infringement."[70]

The Commission has abandoned ideas of US-style class actions, opting instead for 'representative actions', to be brought by qualified entities, such as consumer associations, and opt-in collective actions "in which victims expressly

---

[66] Eurobarometer Special Report 252, "Consumer Protection in the Internal Market", European Commission, 2006, QB28.5 (available at europa.eu.int/rapid/cgi/rapcgi.ksh). It is worth considering that this report notes that since Greeks are those who most regard resolving a consumer dispute in court as easy (51%), it is not surprising that 86 % of them would be willing to assert their claims in a joint action.

[67] Neelie Kroes's speech/07/128, supra note 6.

[68] European Commission, "White Paper on Damages actions for breach of the EC antitrust rules", Com (2008) 165 final, section 2.1.

[69] Commission Staff Working Paper accompanying the White Paper, supra note 4, chapter 2 (Standing: Indirect purchasers and Collective Redress).

[70] Commission Staff Working Paper accompanying the White Paper, supra note 4, p. 69.

decided to combine their individual claims for harm they suffered into one single action".[71]

The European Commission envisages representative actions could be used where, for example, individuals or small businesses do not have the time or resources to start an action of their own or for commercial reasons are reluctant to bring an action against a trading partner.

6.3.2 Two Types of Collective Redress Mechanism in White Paper

In the White Paper, it recognizes that the development of a framework for group actions is necessary in establishing a system of private enforcement. The White Paper is proposing useful criteria for group actions. The Commission suggests two types of collective redress mechanism to encourage actions for the victims such as consumers or SMEs that otherwise be unable or unwilling to seek compensation given the costs, uncertainties, risks and burdens involved.

6.3.2.1 Opt-In Collective Actions

As I already explained, an opt-in collective action combines in one single action the claims from those individuals or businesses who have expressed their intention to be included in the action.[72] Such a system can improve the situation of the plaintiffs by making cost low and raising benefit high by sharing the evidence and costs. However, opt-in collective action can make the litigation complex by requiring the identification of the plaintiffs and the specific harm suffered. An opt-out collective action can be more efficient in terms of corrective justice and deterrence by including a wide number of victims. The crucial problem of opt-out collective action, however, it can lead to excesses as discussed above in respect of the US.[73] In the White Paper, the European Commission suggests an opt-in

---

[71] Ibid. at paras. 41, 51, 59 ; White Paper on Damages actions, supra note 68, p.4
[72] See section 6.1.2 which deals with definition of group actions.
[73] R. Becker et al., supra note 2, p.7.

collective action. [74] It is submitted that these mechanisms which are not combined with US style one-way cost rule and other features of the US system are preferable to the US class actions because they can avoid crucial problems such as abuse of litigation and unmanageability. To avoid abuse of litigation, the European Commission considered that opt-in collective actions are more appropriate than opt-out collective actions since opt-out actions in other jurisdiction have been perceived to lead to excesses.[75]

6.3.2.2 Representative Actions by Qualified Entities

As I already explained, a representative action for damage is an action brought on behalf of two or more individuals or businesses who are not themselves parties to the action.[76] The European Commission suggests that a representative action can be brought by two different types of qualified entities.[77]

The first type is the actions by qualified entities covering entities such as consumer organizations, trade association or state bodies representing legitimate and defined interests which are officially designated in advance by their Member Sates to bring representative actions for damages. [78]

The second type of qualified entities covers entities which are certified on an ad hoc basis by a Member States to bring an action on behalf of some or all of their members only. [79] Eligibility is limited to entities whose primary task is to protect the defined interests of their members other than pursuing damages claims. In order to be designated, i.e. 'endorsed' by their Member State, these qualified entities need to meet specific criteria set in the law.

It has been argued by Commission officials that these two suggestions (opt-in

---

[74] White Paper on Damages actions, supra note 68, at section 2.1.
[75] Rainer Becker, Nicolas Bessot and Eddy De Smijter, "The White Paper on damages actions for breach of the EC antitrust rules", European Commission Newsletter, ISSN 1025-2266, 2008, p.7.
[76] See section 6.1.2 which deals with definition of representative actions.
[77] European Commission, "White Paper on Damages actions for breach of the EC antitrust rules", Com (2008) 165 final, section 2.1.
[78] White Paper on Damages actions, supra note 68, section 2.1.
[79] Ibid.

and representative collective action) can improve the victim's ability to effectively enforce their right to damages. Since these two complementary collective redress mechanisms can constitute a set of solutions that will significantly improve the victims' ability to effectively enforce their right to damages.[80]

6.4. Group Actions in the UK

6.4.1 Overview of Group Actions in the UK

As in Korea, indirect purchasers, such as individual consumers are unlikely to bring actions because individuals and small companies can face numerous potential difficulties in bringing actions before the English courts. Therefore, it is worth considering group actions as useful method to encourage these plaintiffs (in English law called plaintiffs) to bring actions.

In England,[81] there are at present three ways in which the general civil procedure rules allow for some kind of collective action to be brought.

First, the Civil Procedure Rules (CPR) provide for the consolidation of a number of individual actions into one set of proceedings.[82] The consolidated claims are treated as if they were one single action with multiple parties joined to it. The court can also direct that two or more claims should be tried on the same occasion.[83]

Secondly, a number of parties can be joined to a single set of proceedings[84] but it is also possible for one named party ('the representative') to prosecute or to defend an action on both his own behalf and on behalf of a class of individuals.[85] This is a type of 'representative action'. However, it is important to note that the

---

[80] Rainer Becker, Nicolas Bessot and Eddy De Smijter, "The White Paper on damages actions for breach of the EC antitrust rules", European Commission Newsletter, ISSN 1025-2266, 2008, p.8.
[81] References to England include England and Wales. In Scotland and Northern Ireland, different procedural and substantive rules are applied.
[82] CPR 3.1(2)(g).
[83] CPR 3.1(2)(h).
[84] CPR 19.1.
[85] CPR 19.6(1).

representative must have the same interest in the litigation as the individuals who are represented.[86] The provision therefore does not allow for a representative action to be brought by an organization, such as a consumer body for example, on behalf of a class of individuals. The 'same interest' condition has been strictly interpreted by the courts and an attempted class action in a competition case, *Emerald Supplies Ltd and anr v British Airways plc*,[87] which is discussed below, failed on this point. The case has severely limited the potential to use the existing representative action as a class action in competition damages cases.

Thirdly, a mechanism known as a Group Litigation Order (GLO) was introduced in 2000.[88] It was a response to the problems the courts faced in dealing with large scale multi-party litigation such as those involving transport and product liability disasters[89] for which consolidation and representative actions were not adequate. GLOs are basically a form of case management of a large number of individual claims. The Civil Justice Council concluded in 2008 that the GLO had not succeeded in one of its major goals, namely providing access to justice where large numbers of people have been affected by another's conduct, but individual loss is so small that it makes individual action economically unviable. This is mainly because, as an opt-in action, it requires individuals to take positive steps to commence litigation or join the claim register but individuals who have suffered small losses tend not to take such steps, even though the totality of the aggregated claim is very large.[90]

In addition, the Competition Act 1998 includes a provision, s 47B, for representative consumer actions in cases of infringement of the competition rules

---

[86] CPR 19.6(1). See Civil Justice Council Report, "Improving Access to Justice through Collective Actions", November 2008, p.35 available at http://www.civiljusticecouncil.gov.uk/files/Improving_ Access_to _Justice _through_ Collective _Actions. pdf.
[87] *Emerald Supplies Ltd v. British Airways plc*, IHC46/09, [2009] EWHC 741 (Ch).
[88] Civil Procedure (Amendment) Rules 2000, SI 2000/221. GLOs were introduced as a result of the so-called "Woolf reforms" stemming from the "Woolf report", "Access to Justice: Final Report to the Lord Chancellor on the Civil Justice System in England and Wales" (HMSO, London, 1996) Ch. 17. GLOs are now provided for in CPR 19.10-19.15.
[89] See See Civil Justice Council Report, "Improving Access to Justice through Collective Actions", November 2008, p.28 available at http://www.civiljusticecouncil.gov.uk/files/Improving_ Access_to _Justice _through_ Collective _ Actions. pdf. Civil Justice Council is an Advisory Public Body established under the Civil Procedure Act 1997.
[90] Ibid., p.51

whereby 'specified bodies' may bring claims on behalf of consumers before the Competition Appeal Tribunal (CAT). These are dealt with in section [6.4.2] below.

There has recently been a review of the existing mechanisms for collective redress in the form of a report by the Civil Justice Council to the Lord Chancellor. [91] The Civil Justice Report recommended to the Lord Chancellor that a 'generic collective action' applying in respect of any type of civil law claim should be introduced into English law by Act of Parliament. These actions should be able to be brought by a wide range of representative parties and should be on an opt-in or opt-out basis, subject to court certification. In July 2009 the Ministry of Justice rejected the Civil Justice Council's recommendation for a 'generic' collective action and stated that it preferred to proceed on a sector by sector basis whereby specific provision would be made in respect of different sectors.[92]

As far as competition group actions before the ordinary civil courts are concerned, the most important case is *Emerald Supplies Ltd and anr v British Airways plc* case in the UK.[93] As I already discussed abovein Chapters 2 and 5,[94] the case arose from an alleged price fixing agreement in the air freight services market between British Airways (BA) and a number of other international airlines, including Korean Airlines.[95]

The plaintiffs were two firms which imported cut flowers into the UK from, respectively, Columbia and Kenya. The plaintiffs instituted proceedings on their own behalf but also as representatives of 'all other direct or indirect purchasers of air freight services' the prices of which were inflated. Emerald Supplies was not a 'follow-on' action in that neither the European Commission nor the OFT had made any decision of a competition law infringement. As representatives the plaintiffs relied on CPR 19.6.

In this case, the Court set out the pre-conditions for standing in class actions. Firstly, there should be more than one person who satisfies the remaining

---

[91] Civil Justice Council Report, "Improving Access to Justice through Collective Actions", November 2008, Part 2.

[92] Ministry of Justice, "The Government's Response to the Civil Justice Council's Report: Improving Access to Justice through Collective Actions" , July 2009, http://www.justice.gov.uk/publications/response-civil-justice-report-collective-actions.htm

[93] Emerald Supplies Ltd v British Airways Plc ,IHC 46/09, [2009] EWHC 741 (Ch).

[94] See sections 2.3.3 and 5.5.2 which deals with *Emerald Supplies Ltd v British Airways plc* case.

[95] The others included Air France, Cathay Pacific, Japanese Airlines, KLM, Qantas and SAS.

preconditions. There is no limit to the number or persons in the class to be represented. Secondly, those persons should have the same relevant interest at the time the claim is begun. The identity of interest must exist at the time that when the claim is begun as well as when judgment is given.[96]

The Chancellor of the High Court made an order striking out the representative elements of the claim. He held that the problem was not that the class of 'all other direct and indirect purchasers' was extremely numerous and geographically widely spread[97] but that all the persons in the represented class must have the same interest in the claim as the plaintiffs. That had to be determinable at the time that the claim is issued. In this case the condition was not fulfilled. This case was so crucial because it was a set-back for the use of collective group actions in competition cases in the UK.

6.4.2 Consumer Claims in the Competition Act 1998

6.4.2.1 Overview of Consumer Claims

As I already explained, a representative damages action can be brought under s 47B of the Competition Act 1998 on behalf of two or more individuals or businesses who are not themselves parties to the action.[98] Its aim is to compensate all plaintiffs included in this action for the harm from anticompetitive practice.

As seen above, in England and Wales, some collective mechanisms do exist to enable consumers to achieve redress through the courts, including individual-led group actions. Alongside these mechanisms, in competition area, there is a specific provision enabling representative consumer damages actions to be brought. The Enterprise Act 2002, s.19 introduced an amendment to the Competition Act 1998 which is now s 47B.[99] According to 47B, follow-on damages actions can be brought before the CAT by a 'specified body' on behalf of two or more consumers. These 'consumer claims' must follow a finding of a breach of the Chapter I or

---

[96] *Emerald Supplies Ltd v British Airways Plc* ,IHC 46/09, [2009] EWHC 741 (Ch)., at paras. 30-31.
[97] *Emerald Supplies Ltd v British Airways Plc* ,IHC 46/09, [2009] EWHC 741 (Ch)., at para. 30.
[98] See section 6.1.2 which deals with definition of representative actions.
[99] Competition Act of 1998 s. 47B; Ashurst Report, supra note 9

Chapter II prohibitions of the Competition Act 1998 or of Article 81 or 82 EC by the OFT or of a breach of Article 81 or 82 EC by the European Commission.[100] As I already explained, there are two types of representative action.[101] Consumer claims under s 47B is opt-in rather than opt-out representative actions brought by designated body.[102]

The main benefit of representative actions in the section 47B lies in pooling the resources of a large number of plaintiffs for the purpose of establishing a breach in the law. The then Chairman of the Competition Commission said in 2002 that this provision was inserted to support the aims of the Enterprise Act of reinforcing the links between competition law and consumers' interests.[103]

It is worth considering s 47B in comparison to US class actions because both the UK and the US have a common law legal system. However, the UK has adopted and developed the representative action under s 47B with an opt-in system, which is different to US class actions. US class actions adopt opt-out system under which unless individual members have specifically objected, the final judgment is binding on all members. The major difference with the US class action is that in the UK under section 47B of the Competition Act consumer claims require the clear identification of the plaintiffs. The express consent of all individual members to bring actions is not essential, but those who would like to join the action have to be clearly identified. Thus, the consumers and the represented persons have to be named individually.[104]

Alongside consumer claims, consumer bodies designated by the Secretary of State for Business, Innovation and Skills can complain to the OFT about significant harm to the interests of consumers. These are called super-complaints.[105] The OFT has to publish a reasoned response as to how it proposes to deal with the complaint within 90 days. The designated bodies at present (ie 30 June 2009) are the

---

[100] Competition Act 1998, s.47A((6) and s.47B(2).
[101] See section 6.1.2 which defines group actions.
[102] Competition Act of 1998 s47B (9) says the body is designated by the Secretary of State.
[103] Derek Morris, "First annual lecture of the National Consumer Council", April 30, 2002.
[104] Competition Act 1998, s.47A and B. For the background of this regulation see Department of Trade and Industry, "A World Class Competition Regime", White Paper, Crown Copyright, July 2001, p.50; See also, Holmes, K., "Public Enforcement or Private Enforcement? Enforcement of Competition Law in the EC and UK", 1ECLR 25, 2004, p.32-33.
[105] Enterprise Act 2002 s. 11.

Campaign for Real Ale Limited (CAMRA), the Consumer Council for Water, the Consumers' Association (trading as "Which?"),the General Consumer Council for Northern Ireland (GCCNI), the National Association of Citizens Advice Bureaux (NACAB) and the National Consumer Council (trading as "Consumer Focus").

6.4.2.2 The s 47B Consumer Claim in Practice

The first issue which arises is what bodies are empowered to bring s 47B damages actions. In 1999, only the Consumers' Association was empowered to take action against infringements under the Unfair Terms in Consumer Contracts legislation.[106] The Consumers' Association ('Which?') was the first body appointed, as a *specified body* to bring damages actions before the CAT, on behalf of a group of two or more named individuals.[107] The consumer claim can only be brought on behalf of consumers who consent which mean that this is an opt-in action, not an opt-out.[108] It can be brought only on behalf on 'consumers' and not on behalf of small businesses. Any organization which is empowered to bring damages actions has to notify the OFT before any action is taken and the outcome of any proceedings.[109]

The first consumer claim under s47B was *Consumers Association v JJB Sports PLC.*[110] The Consumers Association under their trading name 'Which?' brought an damages action on behalf of the overcharged consumers after the OFT fined JJB Sports £6.7 million for price fixing of replica England and Manchester United football shirts in 2003. The OFT decided that JJB and a number of other retailers infringed the Chapter I prohibition by fixing the prices of replica football shirts of England and Manchester United in 2000 and 2001 and this was ultimately upheld on appeal to the Court of Appeal.[111] Which?' then recruited consumers to join an action against JJB Sports for overcharging on the football shirts pursuant to

---

106 The Unfair Terms in Consumer Contracts Regulations 1999, SI 1999/2083, Sch.1, Pt 2.
107 Specified Body (Consumer Claims) Order 2005/2365.
108 See Competition Act 1998 s 47B (3)
109 Tim Ward and Kassie Smith, "Competition litigation in the UK", 2005, Thomson, p. 280,7-063.
110 Consumers Association v JJB Sports PLC, 1078/7/9/07.
111 *Football Kit Price Fixing,* OFT decision 1 August 2003, [2004] UKCLR 6, *JJB Sports plc v OFT* [2004] CAT 17; *JJB Sports plc v OFT* [2006] EWCA (Civ) 1318.

the price fixing.[112] One interesting feature of this case was that 'Which?' suggested that whilst a receipt for purchase would be good evidence, a photograph of the consumer (or the person for whom the shirt had been bought) in the 'relevant' shirt might be enough because the team shirts were changed annually. A photograph of the consumer in the 'relevant' shirt could therefore be used to identify the year they were produced to prove that the consumer had bought a shirt which the OFT had proved had been sold at an overcharge.

The case was settled on 14 January 2008. In the settlement JJB Sports agreed to compensate directly any customers who were parties to the action with a payment of £20. Under the settlement agreement, the 130 customers who joined the damages action and who purchased relevant football shirts during the relevant period for up to £39.99 therefore received a payment of £ 20 each. The settlement also provided that other affected customers who were not parties to the Consumers Association's action should receive a payment of £10 by presenting the relevant replica shirt or proof of purchase. If only the shirt was presented and the label was missing, the payment was reduced to £5.[113]

6.4.2.3 Problems with Consumer Claims under s 47B

However, there are considerable problems with consumer claims under section 47 B.

Firstly, the CAT has a dual role as the appeal tribunal from decisions of the OFT and as the tribunal in making damages and other monetary awards under s.47A. The problem is that the role of the CAT has been limited. The CAT has limited discretion and independence in making judgments on infringements of competition law. The CAT has only an appeal function from the OFT or the European Commission and no original jurisdiction to find infringements (other than some powers in the context of appeals). The CAT's only function is in determining entitlement to, and assessing and awarding damages to the consumers represented

---

[112] See www.which.co.uk/reports_and_campaigns/consumer_rights.

[113] These customers were required sign a document waiving the right to further legal action against JJB Sports available at http:// www.which.co.uk/news/ 2008/ 01/ jjb-to-pay-fans-over-football-shirt-rip-off-128 985. jsp

by the representative body where there is already a finding of an infringement by the OFT or the European Commission. In other cases, the plaintiff must bring actions in the Chancery Division of the High Courts.

Secondly, another problem of representative actions is that the consumer claims mechanism constrains consumer organizations to act independently as regulatory enforcers because only the designated bodies can bring damages actions.

Allowing consumer claims by only a specified body can discourage competition group actions. At present, only 'Which?' are allowed to bring damages actions. However, it is not easy to encourage competition actions because it cannot bring all damages actions on behalf of consumers who have damage caused by anticompetitive conduct.

For instance, as I already discussed above,[114] 'Which?' brought a damages action on behalf of the overcharged consumers for price fixing of replica England and Manchester United football shirts in 2003. However, this case is not considered as a success from the point of view of 'Which?'. The amount of damages which JJB had to pay out to the comparatively few consumers (out of a potential million or so) who joined in the action or presented themselves. Furthermore, the payout was only a fraction of what the infringers would have had to pay if it had been an 'opt-out' action. 'Which?' said that it would not bring another action like this.[115] During 2009 'Which?' has lobbied the UK government to introduce an 'opt-out' consumer action.

It is worth noting that the Civil Justice Council Report stated that:

"The representative actions under Section 47B of the Competition Act 1998, operates on opt-in principles, whereby the consent of each consumer is required before that consumer can be a member of the class.....Insofar as the plaintiff and class are concerned, there is important limitation. The representative action can

---

[114] See section 6.4.2.2 which introduces this case.
[115] British Institute of International and Comparative Law, "8th Trans-Atlantic Antitrust Dialogue", London, 15 May 2008.

only be instituted by a specified body as ideological plaintiff and not by a directly-affected consumer as representative plaintiff. "[116]

Thirdly, it is unclear what remedies could be ordered by any court or CAT on behalf of such a body which would have any greater effect than only recompensing the particular consumer on behalf of whom the claims is brought.[117]

6.4.2.4 Possible Solution

Given the role and expertise of the CAT, the possible solution to first problem is to allow the CAT to have appropriate discretion and independence in making judgments about the infringement of competition law. It has been argued that the CAT should not be limited to follow-on actions. For instance, the OFT has said that stand-alone actions can in addition to providing redress, provide an additional and more immediate corrective mechanism in markets affected by anti-competitive conduct. Since they can be brought before competition authorities through investigation or in the absence of any investigation at all. Therefore the OFT has recommended that to ensure immediate corrective justice, stand-alone actions as well as follow on actions should be facilitated.[118]

Therefore, in order to utilise the CAT's expertise in competition issues, the CAT should deal with this type of claim without requiring the prior establishment of an infringement by the OFT or the European Commission.[119] It has been argued that a more active role for the CAT would strengthen its position and contribute to the development of a stringent line in decisions in competition law.[120]

---

[116] Civil Justice Council, "Reform of Collective Redress in England and Wales: A Perspective of Need", A Research Paper for submission to the Civil Justice Council of England and Wales, 2008, p.36-37.
[117] Tim Ward and Kassie Smith, "Competition litigation in the UK", 2005, Thomson, p. 280.
[118] OFT 916, supra note 1, p.14.
[119] G. Facenna, "Restructuring UK Competition Courts and Tribunals: A Summary", Comp. L.J.56 p. 59; Barry J. Rodger, "Private Enforcement and the Enterprise Act : An Exemplary System of Awarding Damages, 24 E.C.L.R.103, 2003 p. 107; see Oughton and Lowry, "Textbook on Consumer Law", 2000, p.86.
[120] Christian Miege and Dusseldorf, "Modernization and Enforcement Pluralism-The Role of Private Enforcement of Competition Law in the EU and the German Attempts in the 7th Amendment of the GWB", Amsterdam Centre for Law and Economics Workshop, 2005, p.16; Barry J. Rodger, supra note 119, p.107.

The Civil Justice Report also recommended that representative actions should still be able to be brought before the CAT but on a stand-alone as well as a follow-on basis.[121]

The possible solution to the second problem (the limitation to designated bodies) is to broaden scope of specified bodies or to allow non-designated consumer organization in order to promoting consumer interest. The consumer claim by non-designated as well as designated consumer organization should be allowed if these consumer organizations are non-profit making organization.

A possible solution to third problem (remedies) is to address specific remedies such as injunctive relief. Compensation for damage affects only the litigants. However injunctive relief could have the broader effect of stopping anticompetitive conduct. Without providing for specific remedy such as injunctive relief, it is not easy to ensure effective enforcement. As I already mentioned,[122] injunctive relief can be an efficient means of ensuring competitive markets by providing private litigants the opportunity to put an end anticompetitive conduct. To encourage competition group actions, it is therefore submitted that it is necessary to provide for specific remedy such as injunctive relief.

6.5 Class Actions in the US

6.5.1 Overview of Class Actions in the US

Although there are several different types of class actions in the US, the most common form involves a plaintiff bringing damages actions on behalf of not only himself (or herself), but also on behalf of a class made up of similarly situated individuals. [123] By class actions, individuals can pursue damages, in a representational capacity, on behalf of all similarly situated unidentified classes of

---

[121] Civil Justice Council Report, "Improving Access to Justice through Collective Actions", November 2008, para. 138 available at http://www.civiljusticecouncil.gov.uk/files/Improving_ Access __ to _Justice _through_ Collective _ Actions. pdf.

[122] See section 6.2.2 which deals with competition group actions in Korea.

[123] Comments of the Section of Antitrust Law and the Section of International Law of the American Bar Association in Response to the Request for Public Comment of the Commission of the European Communities On Damage Actions for Breaches of EU Antitrust Rules, April, 2006, p.42-45.

persons.[124]

Rule 23 and the various state court mechanisms govern class actions in the US. The modern US class action dates from a revision of the Federal Rules of Civil Procedure Rules in the mid-1960s.[125] Antitrust class actions have become commonplace since 1966 since Rule 23 of the Federal Rules of Civil Procedure reversed an opt-in provision to an opt-out provision in 1966.[126] As I already mentioned,[127] with the opt-out system, the class member is bound by the resolution of the class actions unless the class member chooses to opt out of the class. This opt-out system allows potentially thousands of plaintiffs to be conscripted into class actions unknowingly.

The attractiveness of the class action in the US is that it enables one or more individuals with minimal, yet important, claims to bond together and litigate their claims as a strong unified force.[128] The US class action has been described as being designed to improve access to the courts while simultaneously promoting efficiency by allowing courts and defendants to focus their energies on resolving all similar claims in one action.[129] For example, the drafters of Rule 23 of the Federal Rules of Civil Procedure[130] sought to "achieve economies of time, effort, and expense . . . without sacrificing procedural fairness or bringing about other undesirable results."[131]

This creates a greater likelihood that wronged consumers will assert their claims, and it is therefore argued that the availability of the class action can act as a powerful deterrent against infringements of antitrust law.[132]

---

[124] Edward F. Sherman, supra note 15, p.134-136 ("Most other countries view American class actions as a Pandora's box that they want to avoid opening."

[125] Deborah R. Hensler, "Revisiting the Monster: New Myths and Realities of Class Action and Other Large Scale Litigation", 11 Duke J. Comp. & Int'l L., 2001, pp.179-180;Edward F. Sherman, supra note 15, pp.134-136.

[126] FED. R. CIV. P. 23.

[127] See section 6.1.2 which deals with definition and characteristics of opt-out system; See also, Edward F. Sherman, supra note 15, p.146.

[128] D. R. Hensler, supra note 125, p. 182.

[129] See, e.g., Victor E. Schwartz, Mark A. Behrens and Rochelle Tedesco, "Addressing the Elephant Mass of Asbestos Cases: Consolidation Versus Inactive Dockets (Pleural Registries) and Case Management Plans that Deter Claims by the Non-Sick", 31 Pepp. L. Rev.271, 2004, p.280-281 (discussing the history of consolidating asbestos cases to promote efficiency).

[130] As I already discussed above, the Federal Rules of Civil Procedure (hereafter, FRCP) are rules governing civil procedure in US district (federal) courts for civil actions.

[131] D. R. Hensler, supra note 125, p. 182.

[132] See Clifford A. Jones, "Exporting Antitrust Courtrooms to the World: Private Enforcement in a

6.5.2 Problems Created by the Class actions

The US class action has proved controversial and the subject of extensive criticism.[133] It has been alleged that since its adoption in 1938, Rule 23 of the Federal Rules of Civil Procedure has been confusing, illogical, and procedurally deficient.[134] In the following sections I consider the problems of class actions from the perspective of both plaintiffs and defendants.

6.5.2.1 The Plaintiff's Perspective

From the plaintiff's perspective, there are significant disadvantages to class actions.

Firstly, it has been suggested that the shortcomings of class action are partly caused by a tension between procedural fairness and judicial efficiency.[135] Group actions can enhance fairness by increasing access to courts and can enhance efficiency by allowing economies of scale.[136] However, these goals of procedural fairness and judicial efficiency, often conflict with one another since it is difficult to capitalize on the efficiencies generated by the class action without adversely affecting the process by which litigants may pursue individual justice in the courts.

Global Market", 16 LOY.Consumer. L.REV.409, 2004, p.411 (stating that though class actions amount to approximately 20 % of all private actions in the US, they have a deterrent effect because of the potential size o f the damage awards).

[133] See generally, D. Bruce Hoffman, "To Certify or Not: A Modest Proposal for Evaluating the Superiority of a Class Action in the Presence of Government Enforcement", Georgetown Journal of Legal Ethics, 2005.

[134] See, e.g., Benjamin Kaplan, "Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure (I)", 81 Harv. L. Rev. 356, 1967, p.380-386 (describing the confusing categorization of class actions under the original rule and conflicting judicial opinions regarding the binding force of judgments in class action suits).

[135] "The Paths of Civil Litigation", 113 Harv.L.Rev., 2000, p. 1807-1816. It is an editorial.

[136] P. Friedman, D. Gelfand et al., supra note 7, p. 45; See, e.g., Mary J. Davis, Toward the Proper Role for Mass Tort Class Actions, 77 Or. L. Rev. 157, 169 (1998) ("The class action procedure thus evolved as a product of concern for the 'convenient and economical' provision of justice, coupled with the substantive concern of affording a meaningful remedy to large numbers of otherwise disenfranchised victims of breached obligations."); Viivi Vanderslice, Comment, "Viability of a Nationwide Fen-Phen/Redux Class Action Lawsuit in Light of Amchem v. Windsor", 35 Cal. W. L. Rev. 199, 1998, p.216. In this article, Viivi Vanderslice stated that increased access and economic efficiency are among the goals of the class action.

For instance, efforts to enhance procedural fairness for plaintiff class members whose interests may conflict with one another have led courts to insist on subclasses,[137] which inherently undermine the efficiency of the class action ensured by economies of scale. The US class action has failed to alleviate the inefficiencies and may be causing new inefficiencies as the number of class actions grows.

Secondly, class actions can be "fee-generated" which means lawyers can get substantial legal fee through class actions.[138] Fee-generation arises from providing the prevailing (i.e. winning) plaintiffs' lawyer with an entitlement to fees.[139] Fees are calculated in relation to the size of the award, for example as a percentage of whole awards. This is called a contingency fee arrangement. Congress fully intended to encourage private actions in order to maximize deterrence through contingency fees and the one-way cost rules. For Congress's intention to encourage private actions, it is worth considering the view that:

"If an American plaintiff knows that he will not have to bear the costs of any attorney's fees, neither his own nor the other party's, there is more of an incentive to participate in a lawsuit, more of an opportunity to vindicate his purported legal rights, and, indeed, more of an opportunity to gain the help of a lawyer."[140]

However, critics of the system claim that the high costs associated with class actions bear no proportion to the expected benefits for victims. Many class actions generate substantial fees for lawyer but produce little, if any, benefit to the victims of the antitrust conducts because of contingency fee arrangement and coupon settlements (discussed below).[141] It is not plaintiffs but the lawyers, it is said, who

---

[137] *Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 117 S.Ct. 2231, U.S.Pa.,1997.
[138] See *In re Fine Paper Antitrust Litig.*, 98 F.R.D. 48 (E.D. Pa. 1983), modified, 751 F.2d 562 (3d Cir. 1984).
[139] 15 U.S.C. § 15 (2000)
[140] Stephen B. Presser, "How Should The Law of Products Liability Be Harmonized? What Americans Can Learn From Europeans", Global Liability Issues, Vol.2 (Centre for Legal Policy at the Manhattan Institute, 2002, p.5.
[141] Cristina Poncibò, "Regulation and Private Litigation : A Debate Over the European Perspective", 2nd Mises Seminar, 2005, p.21-22; Corinne Bergen, "Generating Extra Wind in the Sails of the EU Antitrust Enforcement Boat", Journal of International Business and Law, 2006, p.223-226; John Pheasant, "Private Damages Actions: Response to the Commission's green paper", CLI 5 8(8), August 2006, p.3; Robert H. Lande and Joshua P. Davis, "Benefits from Private Antitrust Enforcement : An Analysis of Forty Cases",

benefit from class actions. [142] The plaintiffs' lawyers receive substantial fees and minimize their legal costs.[143] In fact, it is argued that what the US experience over the past forty years makes clear is that the combination of contingency fee and the lack of a *loser pays rule*, which means the losing party has to bear not only its own but also the costs of the other party, have made it easy for an US lawyer to bring a claim, which has encouraged abusive litigation.[144]

Thirdly, class actions may feature 'coupon settlements' in which the plaintiffs received coupons for products or services rather than cash awards.[145] This coupon settlement is a practice that has grown up since the early 1990s.[146]

While plaintiffs' lawyers receive cash fees, often in the millions of dollars because of contingency fees and one-way costs, the class action members are awarded compensation of limited value, such as coupons.[147] Coupon settlements may take the form of a discount certificate on future purchases from defendants. For example, in the settlements of *Microsoft* in Minnesota, the plaintiffs got vouchers worth up to $29 to buy new products, while the lawyers received $59.4 million in fees.[57]

University of San Francisco Law Review, 2008, p.882-886.

[142] Emil Paulis, "Policy Issues in the Private Enforcement of EC Competition Law", in 「Private Enforcement of EC Competition Law」 (ed. by Jürgen Basedow), Kluwer Law, 2007 p.14; Coffee, "Rescuing the Private Attorney General: Why the Model of the Lawyer as Bounty Hunter is not Working", 42 Md. L. Rev. 1983, p.215(arguing that the reason the *private attorney general* mechanism failed to live up to its promise relates to the incentive structure contained in the attorney –client relationship).

[143] Christian Miege, supra note 120, p. 11

[144] John H. Beisner, Charles E. Borden, supra note 8, p.22.

[145] Roger D. Blair and Christine A. Piette, "Coupons and Settlements in Antitrust Class Actions", 20 Antitrust 32, 2005, p. 32-34.

[146] See generally, Steven B. Hantler and Rebert E. Norten, "Coupon Settlements: The Emperor's Clothes of Class Actions", Georgetown Journal of Legal Ethics, 2005.

[147] See e.g., Ameet Sachdev, "Coupon Awards Reward Whom? Class-Action Settlements that Pay Lawyers Millions of Dollars and Give Plaintiffs Coupons that are Sometimes Useless Are Drawing Ire in Congress and Some Courts", Chi. Trib., Feb. 29, 2004 (discussing a lawsuit against the maker of Cheerios cereal that netted lawyers $1.75 million in fees while consumers received coupons for a free box of Cheerios, but only if they kept their grocery receipt to prove their previous purchase), 2004 WLNR 17854235; Marguerite Higgins, "Class Members Get Little in Suits", Wash. Times, July 2, 2004 (discussing a lawsuit against Poland Spring for sales of allegedly impure bottle water netted lawyers $1.35 million and consumers coupons for more of the bottled water), 2004 WLNR 811926; Jim Burke, "Carnival Settles Lawsuit", Boston Herald, Apr. 1, 2001 (class lawyer to receive up to $5 million for work in lawsuit alleging inflated port charges while class members will receive coupons worth $25 to $55 off a future cruise), 2001 WLNR 280506; see also Victor E. Schwartz, Mark A. Behrens and Leah Lorber, "Federal Courts Should Decide Interstate Class Actions: A Call for Federal Class Action Diversity Jurisdiction Reform", 37 Harv. J. Legis. 483, 2000 (detailing abuse of coupon settlement class action suits).

Coupon settlements are claimed to be of dubious value to the victims of antitrust infringements for the following main reasons. Firstly, the plaintiffs may never bother to redeem the coupon. They may not need to purchase products of defendants, or they may simply wish to deal with other companies or suppliers' products. Secondly, even if they do choose to redeem the coupons, there may be no real financial benefit. For instance, in the settlements of *Microsoft* in Minnesota, the plaintiffs got vouchers worth up to $29 to buy new products of the defendant. However, they might have been able to buy comparable equipment more cheaply from on-line shopping sites. This type of coupon settlements confers no real benefits on the plaintiffs. Thirdly, defendants are not forced to disgorge their ill-gotten gains when coupons are not redeemed. In such situations, it is difficult to justify paying lawyers their full fees in cash, instead of coupon.

Fourthly, in all civil litigation, the time, expense, and uncertainty of trial create incentives for litigants to settle out of court. However, it is argued that there is a particular problem with the settlement of class actions because the legitimacy and the merits of class action settlements have been rarely scrutinized. Plaintiffs' lawyers often confront a conflict between their clients' interests and their own interests in getting paid.[148] For the lawyer, the immense costs of litigating a class action often mean that it is in their best interest to settle the class's claims.[149] The class action often gives rise to what is described as competitive 'race to settlement' by the plaintiffs' lawyers because if any one of these actions reaches judgment or settlement, the remaining ones cannot have compensation.[150] For instance, if damages actions in a state court are settled, the same case brought before a federal court will be precluded. In other words, a class action before state courts can be a bar to federal class action. Because of this 'do (quickly) or die situation' each

---

[148] See, e.g., Bruce L. Hay, "Asymmetric Rewards: Why Class Actions (May) Settle for Too Little", 48 Hastings L.J. 479, 1997, p. 496(proposing a method to alleviate this danger).

[149] Comments of the Section of Antitrust Law and the Section of International Law of the American Bar Association in Response to the Request for Public Comment of the Commission of the European Communities On Damage Actions for Breaches of EU Antitrust Rules, April, 2006, p.47-48.

[150] "The Paths of Civil Litigation", 113 Harv.L.Rev., 2000, p.1812-1813; John C. Coffee, Jr., "Class Wars: The Dilemma of the Mass Tort Class Action", 95 Colum. L. Rev.1343,1995, p.1370; see, John C. Coffee, Jr., "Rethinking the Class Action: A Policy Primer on Reform", 62 Ind. L.J.,1987, p. 651. (noting "that multiple plaintiffs can be pressured into early and cheap settlements if the defendant can create a race to settlement because those who hold out for trial will be unable or ineligible to receive punitive damages").

plaintiff's lawyer might be more interested in a quick financial gain for themselves than the long-term interest of class members.[151] This problem is especially acute when different lawyers in different state jurisdictions are representing the same class.

Thus, it has been claimed that the class action may create a powerful incentive for defendants and the lawyers for the class of plaintiffs to collude at the expense of class members' interests. Collusion arises when class lawyer's interests align more closely with those of the defendant than with those of the member of class actions.[152] It is alleged that collusion between the class lawyer and the defendants results in inadequate compensation. Defendants can shop for the plaintiffs' lawyer who will agree to the most advantageous settlement because the plaintiffs' lawyers are more interested in their legal fee rather that plaintiffs' compensation. The conflicting interest between plaintiffs and their lawyers can jeopardize both class members' ability to have their claims heard and their chances of obtaining full compensation for their damage.[153]

Fifthly, class actions may impair the plaintiff's ability to obtain adequate compensation for their damage because individual differences among class members may lead to unfair treatment of plaintiffs.[154] Class members with more serious and complex claims may be simply lumped into the class and not given the individualized attention needed to adequate compensation.[155] Whether the claim is settled or it goes to judgment, some plaintiffs may receive windfall verdicts while other plaintiffs with stronger than average claims may not be proportionately

---

[151] See GM Fuel Tank Litig., 55 F.3d 768, 788 (3d Cir. 1995) ("Attorneys jockeying for position might attempt to cut a deal with the defendants by underselling the plaintiffs' claims relative to other attorneys."), cert. denied, 516 U.S. 824 (1995).

[152] A vast literature and a number of judicial opinions explore the problem of collusion between plaintiffs' lawyers and defendants and the adverse effects such collusion can have on plaintiff class members. See, e.g., *In re General Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab.* Litig., 55 F.3d 768, 778 (3d Cir. 1995) (noting criticism that the settlement class action is a "vehicle for collusive settlements that primarily serve the interests of defendants ...and of plaintiffs' counsel"); Susan P. Koniak and George M. Cohen, "Under Cloak of Settlement", 82 Va. L. Rev. 1051, 1996, p.1111("Defendants understand how valuable class settlement can be: liability and transaction costs can be minimized and finality achieved.").

[153] See, e.g., Roger H. Trangsrud, "Mass Trials in Mass Tort Cases: A Dissent," U. Ill. L. Rev., 1989, p. 82-84.

[154] *Martin v. Wilks*, 490 U.S. 755, 762 (1989)

[155] See The Class Action Fairness Act of 1999: Hearing on S. 353 Before the Subcomm. on Admin. Oversight and the Courts of the Sen. Comm. on the Judiciary, 106th Cong. 10 (1999) (testimony of John H. Beisner, Esq.), available at 1999 WL 27320.

compensated. For example, Harvard Law Professor W. Kip Viscusi, who studied this issue, observed that "large loss claims tend to be under-compensated, and lower loss claims tend to be overcompensated."[156]

Furthermore, the weaknesses in other class members' claims may work to the disadvantage of the class as a whole. A class action can aggregate individuals with small monetary claims into an effective client whose legal damage is remarkable. However, it is unsuccessful at aggregating claims having uniformly weak legal merit. It is argued that weak cases may look even worse collectively, and that courts find ways not to certify such a class action.[157]

Sixthly, there is the possibility that absent class members may be inadequately represented by the class representatives[158] because of the opt-out system. It is desirable for the class members to receive appropriate notice but there is usually no perfect way to notify the on-going legal action. [159] The named plaintiffs and the named plaintiffs' lawyers cannot appropriately represent absent class members. Absent class members are often unaware of the existence of the class action until they receive notice of the action after the presiding court has decided the case in favour of the plaintiffs. Thus, class members are highly reliant on lawyers they do not even know and are not appropriately represented by the named plaintiffs and the named plaintiffs' lawyers. The problem is that the decision of the plaintiff's claims can bind the rest of the class members unless those class members affirmatively choose to not participate in the litigation.[160] Consequently, some class members do not even learn of the proceedings in which they can be bound by a decision.

---

[156] W. Kip Viscusi, "Reforming Products Liability 52", 1991.
[157] See, e.g., John C. Coffee, Jr., "Rethinking the Class Action: A Policy Primer on Reform", 62 Ind. L.J. 625, 1987, p.652-654.
[158] The class representatives are named plaintiffs, and the remainder of the similarly situated plaintiffs are absent class members. Typically, only the named plaintiffs and the named plaintiffs' lawyers are actively involved in the litigation.
[159] A. Paul Victor and Eva W. Cole, "U.S. Private Antitrust Treble Damages Class Actions", Asia International Competition Conference, 2008, p.242-243.
[160] Rule 23 of the Federal Rules of Civil Procedure; Edward F. Sherman, supra note 15, p.132.

6.5.2.2 The Defendant's Perspective

From the defendant's perspective too, there are significant disadvantages to class actions.

Firstly, there is possibility of abuse of class antitrust actions by attracting litigants in very numbers indeed.[161] Class actions provide plaintiffs with incentives to bring actions because class actions lower a party's potential cost of losing a legal action and increase a party's potential gain of winning.[162] Research indicates that the aggregation of claims increases both the likelihood that a defendant will be found liable and the size of any damages award that may result.[163]

As far as US class actions are concerned, class actions have flooded the US courts since the 1990s.[164] Some certified classes have contained millions or tens of millions of class members.[165] A survey found that from 1988 to 1998, the number of class action filings against Fortune 500 companies increased by 338% in federal courts.[166] During that same period, that number has increased by more than 1,000% in state courts, reflecting the belief that plaintiffs are more likely to win questionable class actions in state courts.[167] The review of US federal court filings from 1990-2004 also shows a substantial increase in all areas of civil actions, especially complex antitrust litigation.[168] In 2002, for instance, private parties filed over 100 antitrust class actions in federal district courts.[169]

---

[161] John Pheasant, "Private Damages Actions", CLI 5 2 (6), 2006, p.2.
[162] John H. Beisner and Charles E. Borden, supra note 8, p. 25; Franklin M. Fisher, "Economic Analysis and Antitrust Damages", 29(3) World Competition 383, 2006, p. 391-392.
[163] Barry F. McNeil and Beth L. Fancsali, "Mass Torts and Class Actions: Facing Increased Scrutiny", 167 Federall Rules Decisions(F.R.D.) 483, 1996, p.491; Kenneth S. Bordens and Irwin A. Horowitz, "Mass Tort Civil Litigation: The Impact of Procedural Changes on Jury Decisions", 73 Judicature 22, 1989. at 27
[164] See Federalist Soc'y, "Analysis: Class Action Litigation--A Federalist Society Survey", 1 Class Action Watch, at http://www.fed-soc.org/Publications/classactionwatch/volume1issue1.htm; Deborah Hensler et al., "Preliminary Results of the RAND Study of Class Action Litigation", 1997, p. 15.
[165] See, e.g., *Block v. McDonald's Corporation*, (No. 01-409137, Cook County, Illinois, 2002); *Scott v. Blockbuster Inc.*, (No. D162-535, Jefferson County, Texas, 2001).
[166] See Federalist Soc'y, supra note 164 ; Deborah Hensler et al., supra note 164, p. 15.
[167] See Federalist Soc'y, supra note 164; Deborah Hensler et al., supra note 164, p.15; See also John Beisner and Jessica Davidson Miller, "The Class Action Fairness Act: Cleaning Up the Class Action Mess", 6 Class Action Litigation Report 104, 2005, p.108 (noting "the embarrassing state of class action litigation in this country and the growth of magnet state courts that rubber stamp anti-consumer class action settlements")
[168] See Administratie Office of the US Courts, "Federal Judicial Caseload Statistics," Table 2.2, 2004. According to this statistics, from 2000 to 20004, antitrust cases rose 33 %.
[169] See 2002 Federal Court Statistics, Table 5: Antitrust, 24 Class Action Rep. 16 (2003).

There is also the phenomenon of the rise of 'claims' firms who run the opt-out actions. For instance, there is a class action currently before the courts in the US whereby passengers are claiming damages from BA and Virgin as part of the litigation brought pursuant to the fuel surcharge price-fixing case.[170] Between 2004 and 2006 British Airways and Virgin Atlantic conspired to increase the fuel surcharge for flights to and from the US and the UK. Dozens of lawsuits were filed across the country seeking damages resulting from this cartel. UK passengers are joining in that action, and apparently account for 170,000 of the 211,000 claims for refunds processed so far. Following over a year of negotiations, plaintiffs negotiated a comprehensive $200 million settlement of the claims of both US purchasers and UK purchasers who brought actions before courts.[171]

However, it is said that there is potential for abuse by lawyers who can exploit the leverage they gain from class actions to extract settlements, not necessarily solely because of the merits of the underlying claims but because of the size of the defendants' potential exposure to an entire class of plaintiffs.[172] The potential liability that attaches to class actions is so great[173] that it is said that often the most sensible solution is to settle as early and cheaply as possible even with frivolous or non-meritorious actions.[174] The immense pressure on defendants to settle[175] is claimed to frustrate their ability to obtain a judgment on the merits of the plaintiffs' claims. Even where an adverse verdict is improbable, "the risk of participating in a single trial of all claims and facing a once and for all verdict is ordinarily intolerable" to defendants.[176] Settlements in these circumstances are

---

[170] *International Air Transportation Surcharge Litigation*, M-06-01793 CRB, U.S.D.C., Northern District of California.

[171] See the website of Hausfeld & Co, available at http://www.hausfeldllp.com/.

[172] R. H. Lande and J. P. Davis, supra note 141, p.884-885.

[173] See, e.g., Castano, 84 F.3d p. 746 ("The risk of facing an all-or-nothing verdict presents too high a risk [for defendants], even when the probability of an adverse judgment is low.").

[174] Frivolous or non-meritorious actions can be defined as actions have little benefit to public interests such as ensuring competitive economy or enhancing consumer welfare; Clifford A. Jones, supra note 26, p.19; Kati J. Cseres, supra note 18, pp. 8-9. See generally George L. Priest, "What We Know and What We Don't Know About Modern Class Actions : A Review of the Eisenberg-Miller Study", Manhattan Institute for Policy Research, Civil Justice Report No. 9, February 2005; Charles B. Casper, "The Class Action Fairness Act's Impact on Settlement", 20 Antitrust 26, 2005, p. 26 ; Christian Miege, supra note 120, p.11

[175] Peter H. Schuck, "Mass Torts: An Institutional Evolutionist Perspective", 80 Cornell L. Rev. 941, 1995, p.958 (noting that the costs and risks of trial induce settlement of more than 95% of all civil claims).

[176] Barry F. McNeil and Beth L. Fancsali, supra note 163, p. 490

described as "judicial blackmail".[177] In addition to harming defendants by effectively barring their access to a judicial determination on the merits of plaintiffs' claims, it is claimed that this blackmail problem also affects consumers, who ultimately bear the financial burden of frivolous or unmeritorious actions in the form of higher costs for goods and services. Settlements of frivolous or unmeritorious actions can cause windfall compensatory awards and approach arbitrary punitive damages awards.[178] This trend is fuelled in part by the availability of large contingency fees [179] and the introduction of opt-out actions.[180]

Furthermore, when plaintiffs' lawyers pursue frivolous or non-meritorious actions it can divert judicial resources such as judges from the meritorious claims. Former FTC Chair William Kovacic summarized the prevailing view of the antitrust profession as follows:

"Private rights of action U.S.-style are poison. They over-reached dramatically. And we have to use substantial liability standards to push back on what we think are hard-wired elements of private rights of action mechanism."[181]

Thus, it is argued that it is necessary, when fostering private enforcement, to always have regard to the risk of misuse of class actions and frivolous litigation while at the same time aiming at installing a useful and workable system.[182]

Secondly, there is possibility that class actions can have a ruinous effect in

---

[177] See *Castano v. American Tobacco Co.*, 84 F.3d 734, 746 (5th Cir. 1996).
[178] See *Hon. Paul v. Niemeyer*, "Awards for Pain and Suffering: The Irrational Centerpiece of Our Tort System", 90 Va. L. Rev. 1401, 2004; Victor E. Schwartz and Leah Lorber, "Twisting the Purpose of Pain and Suffering Awards: Turning Compensation Into Punishment", 54 S.C. L. Rev. 47, 2002.
[179] Christopher Hodges, supra note 52, p.343 ("One of the most important balancing controls is a rule that whoever loses should pay most (but not all) of the winner's legal costs."); Thomas D. Rowe and Jr., Shift Happens, "Pressure on Foreign Attorney-Fee Paradigms from Class Actions", 13 Duke J. Comp. & Int'l L., 2003, p.127 ("As others have long recognized, class actions could find barren soil if they were transplanted to systems that, like much of the world, maintain bans on contingent fees for plaintiffs' lawyers and adhere to the near-universal loser-pays rule on liability for a winning side's attorney fees.").
[180] See, e.g., Fed. R. Civ. P. 23(c)(2); Benjamin Kaplan, supra note 134, pp.382-386, 393(discussing practice of intervention by individual interested parties in actions under former Rule 23, and explaining that new *opt out* provision of 23(c)(2) in 1966 amendments "makes clear that the judgment in any class action maintained as such extends to the class (excluding opters-out in (b)(3) cases), whether or not favourable to the class.... It is implicit in what has been said that the anomaly of a class action covering only the particular parties does not survive under the new rule.").
[181] William E. Kovacic, "The Intellectual DNA of Modern U.S. Competition Law for Dominant Firm Conduct: The Chicago/Harvard Double Helix", Colum. Bus. L. Rev.1, 2007, p.62.
[182] Christian Miege, supra note 120, p.12.

the relevant industry. It has been claimed that litigation may be controlled by class action lawyers whose objective is to maximize the damages award on behalf of the entire class and the fee award for the lawyers.[183] In individual litigation, the plaintiff could take into consideration such factors as commercial relationships between the plaintiff and the defendant and the probable effects on the industry of a ruinous damage award. However, lawyers rarely consider such effects. These factors tend not to enter into the analysis when class actions lawyers bring actions.

A recent report from New York City Mayor Michael Bloomberg and U.S. Senator Charles Schumer noted that "it has become increasingly clear that, rather than being just an incremental cost of doing business, the mere threat of legal action can seriously--and sometimes irrevocably--damage a company."[184]

6.5.3 A Response to the Problems of Class Actions: The Class Action Fairness Act

As I have explained above, the US the class action presents many problems.[185] To achieve optimal enforcement through effective class actions, it is necessary to consider how to solve these. The key question has been summed up as being how to enable public enforcers to check excessive private enforcement without sacrificing the prospect of privately initiated class actions, which serve as check against deficient public enforcement.[186] There have been many revisions of Federal Rule of Civil Procedure 23 to try to prevent excessive private enforcement. One of the most important of these is the Class Action Fairness Act (hereafter, CAFA) in 2005.[187]

---

[183] P. Friedman, D. Gelfand et al., supra note 7, p. 47.

[184] Michael R. Bloomberg and Charles E. Schumer, "Sustaining New York's and the US' Global Financial Services Leadership 76", 2007, available at http://www.senate.gov/~schumer/SchumerWebsite/pressroom/special_reports/2007/NY_report_final.pdf.

[185] See section 6.4.2 which deals with problems of US class actions.

[186] David Resenberg and James P. Sullivan, "Coordinating Private Class Action and Public Agency Enforcement of Antitrust Law", Journal of Competition Law and Economics, 2006, p.5.

[187] Class Action Fairness Act of 2005, Pub. L. No. 109-002 (codified at 28 U.S.C. § § 1332, 1453, 1711-1715 et al.). The CAFA was signed by President George W. Bush on February 18, 2005, with a declaration that the Act marked "a critical step toward ending the lawsuit culture in the US.", Press Release, The White House, President Signs Class-Action Fairness Act of 2005 (Feb. 18, 2005), available at http:// www.whitehouse.gov/news/releases/2005/02/20050218-11.html.

CAFA was designed to address some of the perceived problems with class action in state courts by expanding federal diversity jurisdiction over large and interstate class actions brought under state law.[188] CAFA was hailed by its proponents as a means of ensuring that cases of national concern get tried in federal courts and of protecting defendants from bias in state courts.[189] If class actions are brought before federal court, CAFA will preclude litigation of separate class actions in state court and minimize costs that may have arisen from parallel proceedings in multiple jurisdictions.

First, CAFA amends the diversity of jurisdiction to allow federal courts to hear most class action, including indirect purchaser antitrust actions brought entirely under state law.[190] CAFA could be a substantive reconciliation that would allow direct and indirect purchaser actions to be fully, intelligently litigated together in federal court under a single standard for pre-trial purposes.[191] CAFA allows defendants to remove certain indirect purchaser class actions from state to federal court, where they can be consolidated with direct purchaser actions filed in federal court. CAFA can ensure that, as a practical matter, state courts will rarely get to interpret their own state antitrust laws, particularly in indirect purchaser actions, because they are so often brought as class actions.[192] Where a defendant's antitrust infringement impacts consumers across the nation, it is probable that indirect purchaser class actions - in federal courts under CAFA - will be subject to JMDL[193]

---

[188] J. Beisner and J. D. Miller, supra note 167 ; Warren W. Harris and Erin Glenn Busby, "Highlights of the Class Action Fairness Act", 72 Def. Couns. J. 228, 2005, p.228-229; Mark D. Whitener, "The Changing Face of Class Action Litigation: The Class Action Fairness Act Cover Story-Editor's Note : Exporting Antitrust", Antitrust Fall, 2005, p. 7; D. Jarrett Arp, "The Changing Face of Class Action Litigation: The Class Action Fairness Act Cover Story Introduction- Be Careful What You Ask For : Unintended Consequences and Unfinished Business under the Class Action Fairness Act", Antitrust, Fall 2005, p. 8-9; Ian Simmons, Charles E. Borden, "The Defence Perspective: The Class Actions Fairness Act of 2005 and State Law Antitrust Actions", Antitrust, Fall 2005, p. 19-20; see also generally, "Class Actions Fairness Act of 2005 Enacted", Simpson Thacher & Bartlett LLP, 2005.

[189] Harris and Busby, Ibid. ; Press Release, U.S. Chamber of Commerce, Chamber Celebrates Landmark Victory in Fight against Lawsuit Abuse (Feb. 17, 2005), available at http:// www.uschamber.com/press/releases/2005/february/05-33.htm); Institute for Legal Reform, Issues--Class Action, at http:// www.instituteforlegalreform.com/issues/ index.php-issues.

[190] See 28 U.S.C. § 1332(d)(2); With regard to overall introduction of changes under CAFA, see generally, Gregory G. Wrobel and Michael J. Waters, "Early Returns: Impact of the Class Action Fairness Act on Federal Jurisdiction Over State Law Class Actions", 21 Antitrust, Fall 2006.

[191] Charles B. Casper, supra note 174, pp. 28-30.

[192] D. Jarrett Arp, supra note 188, p. 8-9.

[193] Judicial Panel on Multidistrict Litigation is a special body within the US federal court system. It was established by Congress in 1968 under 28 U.S.C. § 1407 and has provided for transfer and consolidation of multidistrict litigation; See also Andrew I. Gavil, "State Indirect Purchaser Actions: Proposals for

consolidation, and will often be transferred away from the state(s) in which they are initially filed. Indeed, there is some early evidence that this is occurring.[194]

Second, CAFA addresses coupon settlements in which plaintiffs receive coupons or other types of in-kind payments that might not be not fair and adequate.[195] Coupon settlements would not be barred, but a party who insists upon a coupon settlement would have the burden of demonstrating its fairness and adequacy. CAFA requires the parties to notify appropriate state and federal agencies before settlements are approved by the court. Furthermore, it limits the plaintiffs' lawyer's fees in connection with coupon settlements. Under this provision, contingency fees in coupon settlements are to be based on the value of coupons actually redeemed, rather than the total value of the coupons awarded.[196] For instance, if the settlement provided for $5 million in coupons but only 20% of class members actually redeemed the coupons, the lawyers' fees would be based on a recovery of $1 million, not $5 million.[197] The aim of the legislation in this respect, therefore, is to curb the widespread abuses in coupon settlement.

6.6. Conclusion on the best way forward for Group Actions in Korea

As I already discussed, the role of consumers has been changed from being a collateral part of industrial policy to being the final judge of the competition with Korea's economic growth. With the changed role of the consumer, there have been efforts to encourage private actions to protect consumer interests.

Reform before the Antitrust Modernization Commission, 2005, p. 23.

[194] See Charles B. Casper, supra note 174, pp. 28-32(citing preliminary data suggesting that during the period February 18-August 30, 2005, "788 proposed class actions raising claims under state laws were commented in or removed to federal district courts, compared to 507 such cases during the same period in 2004").

[195] Class Action Fairness Act of 2005, Pub. L. No.109-2, 119 Stat. 4 (2005); D. Jarrett Arp, supra note 188, p. 9; Charles B. Casper, supra note 174, pp.27-28. See also Roger D. Blair and Christine A. Piette, "Coupons and Settlement in Antitrust Class Actions", 20 Antitrust 32, 2005, pp.33-36; Edward P. Henneberry, "Private Enforcement in EC Competition Law: The Green Paper on Damages Actions- The Passing-on Defences and Standing for Indirect Purchasers, Representative Organizations and Other Groups", Heller Ehrman, LLP, 2006, p.13.

[196] Class Action Fairness Act of 2005, Pub. L. No. 109-2 § 3, 114 Stat. 4 (2005) (codified at 28 U.S.C. § § 1711-15), (discussing lawyers' fees in coupon settlement cases).

[197] J. H. Beisner and J. D. Miller, supra note 167.

However, there have, up to the present, been only a few private competition actions in Korea. Very often individual (including consumer) damage is too small to make it feasible or attractive for the victims to bring actions. Given that anticompetitive conduct can result in a great many persons suffering from some loss caused by the same anticompetitive practice, some facilitating mechanism such as group actions must be considered. It is essential to allow the combination of individual loss by way of group actions because group actions can bind all members of actions to ensure the members' interests. To protect consumer interests it is submitted that user-friendly group actions must be permitted.

In order to defend consumer interests and develop competition damages actions, the KFTC made the provision for of group actions which was adopted on January 1 2007 under the Consumer Fundamental Act.[198] However, as I discussed above,[199] Korean representative actions have crucial difficulties in ensuring the consumer interests because the Consumer Fundamental Act does not provide for compensation in the form of damages for anticompetitive practices. It recognizes only injunctive relief and does not include monetary claims. It is submitted, however, that it is necessary to allow damages actions in competition representative actions in order to ensure public interests such as the consumer interest because victims of anticompetitive conduct can obtain compensation only through civil damages actions. Therefore, the provisions of the Consumer Fundamental Act should be amended to provide for damages actions in the form of opt-out representative actions. Procedures of quantification and distribution among consumers should be also included in the provision.

However, the spread of group actions may increase litigation which could result in abuse of litigation as it has it in the US. In pursuing the defence of consumer interests and development of competition damages actions, it is desirable to strike the right balance between encouraging legal actions and preventing abuse of litigation because group actions have a tendency to lead to abuse of litigation by lowering the costs and raising the benefits to potential plaintiffs. To achieve an

---

[198] Consumer Fundamental Law 76; See section 6.2.2 which deals with competition group actions in Korea.
[199] See section 6.2.2 which deals with competition group actions in Korea.

appropriate balance between these two factors, it is necessary to consider the practice of group actions in other jurisdictions from which Korea can draw some lessons. The US has a long history of class actions practice. However, the US has the undesirable side-effects of class actions in the form of abuse of litigation and unmanageability caused by opt-out system, contingency fees and one-way cost rules because these systems can lower the burdens of plaintiff in bringing damages actions. As I discuss above, the mechanism of US class actions has been the subject of extensive criticism because of the potential for abuse by class representatives and lawyers who can extract settlements.[200]

It is submitted that UK consumer claims as provided for in the competition Act 1998 s 47B are more appropriate than US class actions for Korea because they can avoid the worse problems of US class actions. In the UK, there are cases that Korea can look at for guidance. For instance, there has been the critical consumer claim, *JJB Sports PLC*.[201] It is worth considering this case even if it was not considered a success by the Consumer Association, 'Which?' since in it used interesting ways of establishing the consumer's right to part of the represented class. In this case, a photograph of a person wearing the 'relevant' shirt was good evidence for anticompetitive damage caused by infringers' price-fixing of the football shirt. Given the difficulty of proving anticompetitive practice, it is useful point, the Korea might consider similar mechanism to mitigate the burden of proof of plaintiffs even if this is to confuse the proof of the anticompetitive practice with the issue of whether a particular person was one of the consumers who was injured by it.

Korea, like the UK has an opt-in system and a loser-pays rule which can prevent abuse of litigation and ensure manageability of representative actions by involving an organizationally strong association.[202] This opt-in arrangement is contrast to opt-out arrangement which can include very large numbers of class-members. Korea representative actions and opt-in system can be useful method to

---

[200] See section 6.5.2.2 which deals with problems created by the class actions from defendant's perspective.

[201] Consumers Association v JJB Sports PLC, 1078/7/9/07.

[202] In respect to opt-in system and loser-pay rule in Korea see, section 6.2.2 which deals with competition group actions in Korea.

avoid US abuse of litigation. The European Commission also proposed an opt-in system and representative actions in the White Paper to prevent abuse of litigation.[203]

However, it can be argued that opt-in actions are simply not as effective as opt-out systems because there is no perfect way to notify every victim of the suit. This was clearly demonstrated in the UK by the *JJB Sports PLC* case which was really not very successful because of the limitations of the opt-in system. The case showed how difficult it is to bring an opt-in representative action when such small amounts of money are in issue and the case is brought so long after the event. Thus, it is worth considering opt out system since opt out system can be more effective than opt in system by involving many victims without obvious intention to be included in actions.

In Korea, only the designated bodies by law can seek approval from the court before bringing a representative action. To balance between encouraging private enforcement and avoiding unmanageability, it is desirable to broaden the scope of organization.

Given that group actions are one of the mechanism to ensure the ability of private parties to bring actions, these actions should not deprive persons of the right to bring an action individually. Group actions must be an alternative mechanism. In respect to group actions, therefore, further thought will be needed to ensure appropriate rules of group actions. Alongside representative actions, to protect the consumer interest, it would be necessary for the empowered consumer body also to have power to complain to the KFTC because the KFTC can handle cases quickly and with extensive investigation powers without any private resources.

---

[203] White Paper on Damages actions, supra note 68, section 2.1; Neelie Kroes, " Collective redress in Europe : Address at the panel discussion organised by DHIK at the Representation of the Free State of Bavaria to the EU", Brussels, 10th December, 2008, p.4.

Chapter 7. Conclusion

This thesis has sought to determine the best way forward for Korea in respect of certain major issues about which rules must be adopted if a proper system of private damages actions for breach of the competition rules is to flourish. These issues are the type of damages to be awarded, the passing on defence, the position of indirect purchasers, and group (or class) actions. The first three of these raise fundamental questions about what private damages actions are trying to achieve. The last raises the difficult matter of how the legal system can enable persons who have suffered comparatively little loss relative to the cost of litigation to sue. In determining the best way forward for Korea this thesis has looked for comparison at three other jurisdictions, the EU, UK, and US, in order to identify whether there are policies, practices or procedures which Korea could usefully follow and, just as importantly, whether there are those which it should avoid.

The relevant Korean legislation was set out in Chapter 2. It was explained there that the Korean system establishes a public body, the KFTC, to enforce both the Competition Law, enacted on April 1, 1981 and other relevant legislation, including consumer legislation[1] and that the KFTC has substantially contributed to promoting consumer interests through its enforcement of both competition and consumer laws. On the other hand, private enforcement, including damages actions, has been limited, partly because of the non-litigious nature of Korean legal culture and partly because of the lack of strong incentives to litigate in comparison, for example, to those in the US, as seen in the preceding Chapters.

It can be argued that given the fundamentally public nature of the objectives of Korean competition law which, as seen in Chapter 1 'are to promote fair and free competition, to thereby encourage creative enterprising activities, to protect consumers, and to strive for balanced development of the national economy

[1] The nine other laws include the Omnibus Cartel Repeal Law (1999) and the Consumer Fundamental Law (2006), see Chapter 2.

consumer welfare'[2] it is more suitable that the law is enforced by a public body than by private action. Nevertheless US law, which is largely enforced by private action, also pursues the public objectives of consumer welfare and efficiency. However, the US position has to be seen in the context of a culture of individualism and individual rights which is quite different from the nature of Korean cultural and societal norms. This does not mean that private damages actions should not be encouraged in Korea, as they can play an important role in complementing public enforcement by the KFTC, particularly, as explained in this thesis, by providing additional deterrence. Also the KFTC, like most other competition authorities around the world, lacks the resources to pursue all competition infringements. Optimal enforcement, it is submitted, therefore requires private action as a complement to public enforcement.

The differences between public and private enforcement can offer the victims the opportunity to balance the advantages and disadvantages of private and public enforcement whether by way of a complaint to the competition authorities or through the issuing of legal proceedings. A victim could choose the most effective action between both complaint and private proceedings although a court might stay private proceedings while the public proceedings are going on. However, this is subject to the reservation that the most attractive form of private action may be the 'follow-on' action whereby the victim is able to rely on a previous finding of the public enforcer before a court or other tribunal, rather than the 'stand-alone' action where the victim has to prove the infringement from the beginning.[3] Where this is so the resources of the public enforcer are not relieved by the use of private actions because public enforcement is still required to trigger the private action. Nevertheless, the additional deterrence element remains.

A vital factor in respect of private enforcement in Korea is that, like the public enforcers in other jurisdictions, the KFTC cannot compensate victims for losses from anticompetitive conduct. The surcharges (fines) imposed by the KFTC go to the public purse, not to those who have suffered loss through the infringement

---

[2] Korea Competition Law.

[3] See Chapter 2 which deals with stand alone actions for the position on this in Korea.

of the competition rules. Only Korean courts can award damages. As already noted,[4] and as the KFTC has said itself, the legislative history of competition law in Korea shows a predominant concern for consumers.[5] It is therefore important in Korea to ensure that the combined system of private and public enforcement brings the implementation of competition law closer to consumers by having effective remedies to protect their rights under competition law. Both to enhance consumer welfare and protect consumer interests there needs to be mutually fruitful interaction between private and public enforcement. Although private enforcement and public enforcement aim at different aspects of the same phenomenon, both can strengthen the impact of competition rules. An effective system of private damages actions does not alter the basic goal of the competition rules, which is to safeguard the public interest by maintaining undistorted competition. Structured properly, however, private actions can positively contribute to optimal enforcement. Thus, private enforcement rules and procedures should be clear and predictable and should maximise the opportunity for victims to achieve redress without chilling genuinely pro-competitive behaviour (Type 2 errors) or giving rise to abuses of litigation.

In the light of these considerations it is submitted that it is right that, as I discussed Ch 2,[6] for Korea to encourage private enforcement and to have recently paid a great deal of attention and effort to private enforcement, particularly actions for damages. The KFTC has regarded some reform of the rules governing private enforcement as necessary because there is a general recognition that public enforcement by the KFTC should be supplemented by private enforcement to a greater extent. To foster private rights of action, the KFTC has tried to remove obstacles and to create an effective system for fostering successful claims by revising the provisions of damages actions in 2004. These provisions enable potential plaintiffs to bring damages actions without a prior decision of the KFTC i.e. stand-alone actions as well as follow-on actions can now be brought in Korea. However, in addition to these changes the encouragement of private actions also necessitates providing private parties with economic incentives to bring actions

---

[4] See Chapter 2 which deals with private competition enforcement of Korea.
[5] See 2008 KFTC Annual Report.
[6] See section 2.1 which deals with overview of private competition enforcement in Korea.

before the courts rather than through the KFTC. In the absence of strong incentives to bring damages actions, it is difficult to encourage private enforcement as an effective mechanism to achieve optimal enforcement. Thus, it is necessary to ensure the appropriate incentives.

One of the incentives to be considered concerns the type of damages that should be awarded in cases concerning the infringement of the competition rules, as discussed in Chapter 3.[7] Damages at an appropriate level can be a tool to increase private parties' motivation to detect and prosecute illegal activities.

As far as the type of damages to be awarded is concerned, it is necessary to consider whether Korea needs to go beyond merely awarding damages which compensate for the losses suffered. Korea could make a private right of action for individuals or entities harmed by anticompetitive practices very attractive by recognizing exemplary, restitutionary or multiple damages such as treble damages in order to encourage private enforcement. For instance, as shown in Chapter 3, treble damages in the US have been a strong incentive for plaintiffs to bring damages actions.[8] In respect to deciding on the type of damages that should be available, the crucial questions are which type of damages provides the appropriate level of enforcement and which types of damages are acceptable within the Korean legal system.

If Korea were to adopt exemplary, restitutionary or multiple damages, it could encourage private enforcement. However, such damages are inconsistent with the principle of compensation for damage which is a fundamental principle of the Korean legal system. Korean legal tradition has hitherto avoided exemplary, restitutionary or multiple damages because they bear no relation to the actual loss and can cause unjust enrichment and multiple liabilities. Instead of recognizing these types of damages Korea recognizes the concept of 'full compensation' which includes lost profits and interest. Korean civil law makes it clear that the damages which may be awarded include all monetary awards. It is submitted that through full compensation, compensatory damages can provide sufficient incentives to

---

[7] See Chapter 3 which deals with the principle of compensation for damages.
[8] See section 3.2.4 which deals with the mandatory treble damages in the US.

bring damages action without the introduction of exemplary, restitutionary or multiple damages,

It must be recognised that given the deep-rooted principle of compensation for losses suffered as the basis for damages in Korea there is in reality little chance of the adoption in Korean competition cases of exemplary, multiple or restitutionary damages because they are not related to actual loss and can result in a windfall to plaintiffs. However, it is submitted that, as shown in the Conclusions to Chapter 3, such an adoption is undesirable as well as unlikely. Chapter 3 explained the problems that have arisen in the US as a result of mandatory treble damages actions in antitrust cases, such as over-enforcement and abuse of litigation. Korea should avoid replicating these. In addition, damages based on anything other than the compensatory principle can be objectionable on the basis that it confuses compensation with punishment, leads to double liabilities, produces unjustified enrichment of the victim and risks over-enforcement. Also, unless some allowance is made in respect of leniency applicants, exemplary, multiple or restitutionary damages may risk damaging the attractiveness and thus the efficacy of the KFTC's leniency programme.

Given the KFTC's power to impose substantial surcharges (fines)[9] and criminal sanctions, it is submitted that it is not necessary to adopt exemplary, restitutionary or multiple damages in order to ensure deterrence, punishment and the disgorgement of illegal gains.[10] Given the substantial surcharges and criminal sanctions in Korea and the apprehension of the abuse of litigation seen in the US, damages actions in Korea should continue to be about compensation and must not be used to punish companies or force disgorgement of illegal gains. If heavy enough, a public sanction such as appropriately calculated surcharges and criminal sanctions including prison sentences can create a powerful effect of deterrence, punishment and can effect disgorgement of illegal gains into the public purse. In respect to the importance of creating the right balance between private and public enforcement, if punishment, disgorgement of illegal gains, or deterrence beyond the

---

[9] As discussed in Chapter 1, in Korea, fines imposed by the KFTC are called asurcharges.
[10] Competition Law 57; Byung-Ju Lee, "The Harmonization of Public and Private Enforcement: A Korean Perspective", The 5th Seoul International Competition Forum, 2008, p. 3.

possibility of having to pay compensation is required, it is more desirable to achieve these by the KFTC rather than by private exemplary, restitutionary or multiple damages.

In conclusion it is submitted that there is no justification for the introduction in Korea of exemplary, restitutionary or multiple damages. The recovery of actual damages can serve as a sufficient incentive to bring damages actions and serve as a deterrent to undertakings not to infringe. Appropriate sanctions including heavy surcharges and prison sentences can create a powerful effect of deterrence and effect disgorgement.

Turning to the matters discussed in Chapter 4, the passing on defence is relevant to the encouragement of private actions because the it is closely related to the amount of compensatory damages that can be awarded. As I discussed in Chapter 4,[11] the passing on defence is important to the issue of the encouragement of private enforcement because it can affect a private party's incentives to bring actions by influencing on the amount of damages which can be obtained. If the passing on defence is permitted, the amount of damages that direct purchasers can recover may be decreased, whereas indirect purchasers may be able to get compensation for the amount of damage they suffered. However, if the passing on defence is not allowed the amount of damages of direct purchasers can recover may be greater, but indirect purchasers may not get compensation at all.

As seen in Chapter 4,[12] in the *Hanover Shoe, Inc. v. United Shoe Machinery Corp* case,[13] the US Supreme Court rejected the use of the passing on defence in antitrust cases. It prohibited the passing on defence in such cases because of a fear that if competition infringers get off too easily, the prospect of liability for private damages may not provide an appropriate level of effective deterrence. Thus, by not recognizing passing on defence, an antitrust infringer cannot avoid liability to a direct purchaser by showing that the direct purchaser suffered no injury because it passed on any overcharge to its own customers.

---

[11] See section 4.1 which deals with overview of the passing on defence.
[12] Section 4.2 deals with the passing on defence in the US.
[13] *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*, 392 U.S 481 (1968).

Given the US attitude to the passing on defence and the tension between taking the best action to deter anticompetitive conduct by excluding the passing on defence (as was the motive for the *Hanover Shoe* ruling) and having rules which prevent unjust enrichment, the key question is whether Korea needs to follow the US approach. This is part of the whole question of whether Korea should consider changing its legal system in some respects in order to introduce private enforcement rules more like those of the US.

If Korea were to follow the US attitude to the passing on defence, Korea would have to modify its usual approach to competition damages awards because only actual damages can be compensated for in Korea. Prohibiting the passing on defence would represent a significant exception to the traditional Korean legal principle of compensation for actual damages. In considering whether to make such an exception, it is necessary to recognize the differences between the Korean legal system and US legal system and also to take account of the fundamentally different way that the enforcement systems are set up.

On the one hand, the competition enforcement mechanism in the US is primarily through private actions. As discussed in Ch 1,[14] the primary objective of private enforcement in the US is deterrence not compensation. In order to deter antitrust conduct through private enforcement, the US system aims to make private enforcement as attractive as possible, both in terms of the potential recovery and the speed and ease of the procedure.[15] To make private enforcement attractive, the US has adopted such features as treble damages, contingency fees, the one-way cost rule and opt-out class actions. However, as seen in Chapters 3-6, these strong incentives have caused problems such as abuse of litigation.

On the other hand, the primary competition enforcement mechanism in Korea

---

[14] In respect to the objectives of US private enforcement, see section 1.2.3.

[15] Brian Kennelly, "The Defence of "Passing On", Bar European Group Annual Conference", Cyprus, 2005, p. 9; See, W. van Gerven, "Substantive Remedies for the Private Enforcement of EC Antitrust Rules before national Courts, in : European Competition Law Annual 2001-Effective Private Enforcement of EC Antitrust Law, ed. By Ehermann and Atanasiu, 2003, p. 53-93, 74-75.

is through a public authority, the KFTC. As discussed in Ch 1,[16] the primary objective of private enforcement in Korea is therefore compensation of victims, not deterrence. To ensure full and just compensation, civil law and competition law recognize the actual damages. From the perspective of Korean civil law and competition law, the prohibition of the passing on defence is incompatible with the principle of compensation for damages. Under the principle of compensation for damages, awards of damages should provide compensation for actual loss, which would be measured by what the victims would have had in the absence of the anticompetitive conduct. If the direct purchaser is allowed to claim the amount of the overcharged price without any deductions for passed on overcharge into indirect purchasers, he would, in the view of Korean legal principles, be unjustly enriched. Thus, direct purchasers who have been able to pass on overcharge to their own customers should not be entitled to compensation of that overcharge.

However, the passed on overcharge may lead to a reduction in sales by the direct purchaser as a consequence of him raising the price. It is not desirable for defendants to be exempt from liability merely in order to avoid a possible unjust enrichment in the direct victim's assets. Thus, it is submitted that passed on damage, and the actual enrichment of the victim if the defendant had to compensate him, should be treated as cumulative conditions before the defendant can raise the passing on defence. Thus Korea should recognise the passing on defence but apply stringent controls to ensure that the reduction in repayment to the victim are truly warranted. Given that this is done, Korea should not privilege the principle of deterrence over that of preventing over-compensation. In a system of enforcement which is primarily public in nature deterrence need not out-trump all other considerations of justice and fairness.

In Chapter 5 indirect purchaser were discussed. Indirect purchaser actions are important for the encouragement of private enforcement because they involve the number of potential plaintiffs such as consumers. Indirect purchaser actions are closely related to fair and effective compensation. On the one hand, indirect actions are important for ensuring fairness of private enforcement because if indirect

---

[16] In respect to objective of US private enforcement, see section 1.2.3 which deals with objectives of private competition enforcement.

purchaser actions are not allowed, many potential plaintiffs (real victims) are not able to exercise their rights under competition law. To ensure fairness, any right of actions for compensatory damage must be formulated to ensure remedies for indirect purchasers such as consumers in order to avoid the danger of significant injustice.[17] Even if the defendant succeeds in proving the passing on defence, the indirect purchaser may have a good argument in his actions against the infringer.

On the other hand, as I discussed in Chapter 5, if all indirect purchasers can bring damages actions, a number of complications are likely to arise in ascertaining, apportioning and distributing the loss resulting from the infringement. To avoid these problems and ensure effective enforcement, in *Illinois Brick,* the US Supreme Court denied indirect purchaser actions.[18] However, in the name of efficiency, it is submitted that the *Illinois Brick* decision has substantially impaired fair justice by denying compensation to indirect purchasers who are the real victims.[19]

The key question is whether Korea should follow the indirect purchaser principle established in *Illinois Brick* to ensure effective competition enforcement. *Illinois Brick*, however, is the corollary of *Hanover Shoe*: neither the passing on defence or indirect purchaser claims are recognised in the US. Not to recognize a passing-on defence but still to allow indirect purchaser actions is to permit duplicative recoveries. This might provide additional deterrence but even the US Supreme Court, with its emphasis on deterrence was not prepared to countenance that Although it can be argued that it is desirable to put compensation for damage in every indirect purchaser's hand, for the reasons explained in Chapter 5, the exclusion of indirect purchaser actions can be destructive of the fundamental principles of private competition actions because of three main reasons: it infringes the concept of full compensation, fails to protect of consumers' interests directly, and does not satisfy the goal of effective and efficient enforcement.

If indirect purchaser actions are not allowed and direct purchasers from a

---

[17] William H. Page, "Policy Choices in Defining the Measure of Antitrust Damages", DAF/COMP/WP3, 2006 p. 5.
[18] See sction 5.2 which deals with passing on defence in the US.
[19] See sction 5.2.4 which deals with the problems in following the US position on indirect purchaser litigation.

cartel who raise their prices and passed them on to indirect purchasers get compensation for the overcharge from the cartelists, direct purchasers can be unjustly enriched at the expense of those indirect purchasers such as consumers.

Furthermore, to ensure effective and efficient private damage actions, it is desirable to provide a remedy for the all victims of the anticompetitive conduct because the more indirect purchasers who bring damages actions, the more effective the competition system will be and the more relevant it will be to consumers. Therefore, it is desirable that under Korean competition law and civil law[20] that an indirect purchaser who has been passed on an excessive price in whole or in part, for example, should be able to recover applying a traditional 'but for' approach.[21] As I discussed Ch 5, the only limit should be that those entitled to recover must be persons with damage protected by competition law.[22] Therefore, in it is submitted that in Korea both direct and indirect purchasers should have the right to bring damages actions but the passing-on defence should be recognised. Indirect purchasers could include competitors, consumers or other market participants.

It has been seen in Chapters 4[23] and 5[24] that the recognition of the passing on defence and indirect purchaser actions can involve a measure of complexity. However, it is submitted that recognizing the passing on defence and indirect purchaser actions in Korea would not lead to insurmountable difficulties in the handling of private proceedings. While there are considerable practical difficulties in the determination, calculation and distribution of damage between direct and indirect purchasers, these problems can be minimized by the use of the modern sophisticated econometrics techniques and statistical analyses that have now been developed. In any event, practical difficulties should not be allowed in Korea to undermine the justice and fairness of the legal system in this regard.

---

[20] Provision of damages actions under civil law is fundamental to provision of damages actions under competition law.

[21] In respect to but for approach, see section 4.3.2.3 which deals the prohibiton of over-compensation in Korea.

[22] In respect to antitrust injury doctrine see Chapter 1.

[23] See sections 4.6 which deals with conclusion of passing on defence.

[24] See section 5.6 which deals with conclusion of indirect purchaser actions.

Furthermore, as discussed in Chapter 3,[25] to minimize the difficulties of awarding damages it has been provided under Article 57 of the Korea Competition Law that in cases where it is difficult to verify the amount of damage the court may confirm the substantial amount of damage by virtue of its legal authority.[26] It is submitted that to further ameliorate the difficulty of quantification of damage this provision should be augmented to include specific rules for allocating recoveries between direct and indirect purchasers and to streamline what can admittedly be a complicated process. In particular, it is submitted that Korea could consider adopting the type of presumption that the EC Commission suggests in the White Paper. There it is proposed that there should be a rebuttable presumption that the illegal overcharge has been passed on in its entirety. [27]

Korea must also decide whether it needs to take steps to provide for group actions, as discussed in Chapter 6. The problem is that many victims of anticompetitive infringements, especially individuals with small, losses may be discouraged from going to court. Given that anticompetitive conduct can result in a great many persons suffering some loss caused by the same anticompetitive practice, for the protection of the rights of indirect purchasers such as consumers, it is essential to allow the combination of individual losses by way of some type of group actions because without group actions there will be few claims for damages. Group actions could create a more streamlined procedure through avoiding inconsistent and contradictory decision.

In Korea, as discussed in Chapter 6,[28] consumers have played an important role in stimulating competition on the market and therefore played an important role in Korea's economic growth. To protect consumer interests effectively, the KFTC made provision for representative actions in the Consumer Fundamental Law of January 1 2007.[29] As seen in Chapter 6,[30] however, there have up to the

---

[25] See section 3.2.1 which deals with the principle of compensation for damages in Korea.
[26] It is a reference to the Competition Act 57 which I set out in the Chapter 3.
[27] In respect to the type of presumption that the EC Commission suggests in the White Paper, see European Commission, "White Paper on Damages actions for breach of the EC antitrust rules", Com (2008) 165 final at section 2.6; See also section 5.4.2 which deals with desirability of permitting indirect purchaser litigation in the EU.
[28] See section 6.2.1 which deals with overview of consumer policy and current situation of group actions in Korea.
[29] Consumer Fundamental Law 76; See section 6.2.2 which deals with competition group actions in

present been only a few private competition actions in Korea.

To encourage private enforcement through group actions, it is desirable to consider the experience with group actions in other jurisdiction from which Korea can draw some lessons. In particular, the US has a long history of class actions practice which has played a substantial role in encouraging private enforcement. The US class actions have encouraged private enforcement by lowering the costs of, and raising the benefits to potential plaintiffs. However, as I discussed in Chapter 6, [31] Opt-out class actions combined with the lure of treble damages and one-way costs rules which depart from the loser-pays rule have led to undesirable effects such as abuse of litigation and unmanageability which in turn has created a need for safeguards.[32]

It is submitted that UK consumer claims as provided for in the Competition Act1998 s 47B are more appropriate than US class actions for Korea because they can avoid the worse problems of US class actions. Korea, like the UK, has a representative action which can prevent abuse of litigation and ensure manageability of consumer claims by involving a strong consumer organization. This representative action has opt-in rather than opt-out arrangement.

However, it can be argued that opt-in actions are not as effective as opt-out actions. Opt-out arrangement can usually include a larger number of class members because there is often no perfect way to notify every victim of the anticompetitive conduct that an action is being brought. This was clearly demonstrated in the UK in the s 47B consumer claim *JJB Sports PLC*[33] which was regarded as an unsatisfactory case because of the limited number of consumers who joined in the opt-in action. Thus, it is submitted that Korea should make representative actions more attractive by adopting an opt-out system which provides for actions which can

---

Korea.

[30] See section 6.2.2 which deals with competition group actions in Korea.

[31] See section 6.5.2.2 which deals with problems created by the class actions from defendant's perspective.

[32] Wils, "Should Private Antitrust Enforcement Be Encouraged in Europe?" (2003) 26 World Competition, P. 482; See generally, Steven B. Hantler, Mark A. Behrens, Lean Lorber, "Is The Crisis in the Civil Justice System Real or Imagined?", Loyola of Los Angeles Law Review, 2005.

[33] *Football Kit Price Fixing*, OFT decision 1 August 2003, [2004] UKCLR 6, *JJB Sports plc v OFT* [2004] CAT 17; *JJB Sports plc v OFT* [2006] EWCA (Civ) 1318.

involve many victims without them having to actively take steps to be included in the proceedings.

Most importantly, at present Korean representative actions have crucial problems in ensuring the consumer interest because they do not provide for compensation in the form of damages actions. The law provides the only for injunctive relief and does not include monetary claims. It is submitted, however, that it is necessary to allow compensation for anticompetitive damages in representative actions because these actions are the only effective way for consumers to be compensated. Therefore, the provisions of the Consumer Fundamental Law should be amended to provide for damages actions in the form of opt-out representative actions. Procedures of quantification and distribution between consumers should be also included in the provision.

The conclusion of this thesis is that in order to protect the public interests as well as private interests, private enforcement should be encouraged in Korea. It is necessary to encourage private enforcement for the optimal enforcement of competition law because only through damages actions can victims obtain compensation for the damage they have suffered. However, it is also desirable because private enforcement can support and complement public enforcement thus advancing the public interest in the rigorous enforcement of competition law for the purpose of achieving consumer welfare and efficiency.

In order to encourage private enforcement it is necessary to eliminate psychological barriers to litigation which certainly have a role in limiting the use of private enforcement in Korea. Given that damages actions have had a crucial role in the enforcement of US antitrust law it is useful for Korea to take some time to understand the US legal system which has many effective mechanisms relevant to the damages actions to antitrust damages actions.[34] However, despite these effective mechanisms, the way that the right of private action has worked in practice in the US has been subject to widespread and substantial criticism because

---

[34] As well as those discussed in this thesis, see e.g. notice pleading, as in *Bell Atlantic Corp. v. Twombly*, 127 S. Ct.1955(2007), and summary judgments as in *McDonnell Douglas Corp. v. Green*,34 411 U.S. 792, 93 S.Ct.1817, 36 L.Ed.2d 668(1973).

the US system has lacked safeguards against abusive litigation and the other problems that have arisen from such a plaintiff-friendly system. There is little to prevent plaintiffs from using these powerful procedures to obtain unwarranted benefits[35] and there are extraordinary opportunities for abuse that can ultimately overwhelm the benefits in the U.S. system.

In considering the creation of a system best-suited for enforcing competition law in Korea, therefore, it is necessary to ask whether competition litigation as practised in the US is the best example to use or whether this competition import requires a more careful inspection. The U.S. experience suggests that fostering private enforcement must always have regard to the risk of misused and frivolous litigation because the result of abusive litigation can be that businesses avoid or abandon pro-competitive innovative practices, which is detrimental to consumer welfare and efficiency.[36]

Furthermore, it is desirable to consider how transplanted procedures and rules from the US would actually work in Korea. It is necessary to consider the difference of legal culture and tradition between the US and Korea because business activities are based on a trust and honour in Korea.

In respect of the achievement of optimal enforcement through private and public enforcement, it must be remembered that the Korean legal system has features which distinguish it from the legal systems in the other jurisdictions discussed in this thesis. Given the difference of its culture from that of the US, even if Korea adopted mechanisms from the US, the undesirable aspects of the US system would not necessarily be replicated in Korea. Some of the problems of the present US system could be prevented by the maintenance of long-standing Korean legal principles based on Korea legal culture and tradition. These legal mechanisms, such as the loser pays rule and compensation for actual damage, can help to protect

---

35 John H. Beisner, Charles E. Borden, "Expending Private Cause of Action: Lessons from the US Litigation Experience", presented at The Trans-Atlantic Challenge: Diverging approaches to regulatory and legal reform in the Untied States and Europe, Brussel, 2005, P. 21.

36 Richard A. Posner, "Antitrust Law", An Economic Perspective 35 (1976) ("The burgeoning of the private antitrust action has induced enormous, and I think justified concern about the overexpansion of the antitrust laws and their increasing use to retard rather than promote competition"*); see also* Frank H. Easterbrook, *The Limits of Antitrust*, 63 TEX.L.REV. 1, 5 (1984) (asserting the "inhospitality tradition of antitrust" is a costly feature of antitrust enforcement because it tends to deter innovative market practices).

Korea against the litigation abuse that has plagued the US legal system. Thus, any moves to US-style antitrust damages actions should take into account any drawbacks or costs associated with having special procedural rules in competition cases and should be approached with extreme caution. The system for private damages actions in competition cases in Korea should aim to promote a 'competition culture' rather than a US-style 'litigation culture'. This thesis comes out strongly in favour of facilitating private competition enforcement in Korea but submits that when Korea adopts legal ideas from other jurisdictions, it is necessary to avoid the negative aspects experienced, particularly, those which have occurred in the US. Thus, the legal framework for more effective competition damages actions should be based on a genuinely Korean approach, with balanced measures rooted in Korea legal culture and tradition.

Therefore, it is more desirable to ensure that Korean private enforcement rules and procedures are clear, predictable and perceived as striking an equitable balance between the interests of plaintiffs and defendants than to follow the US legal system. To eliminate psychological barriers, for example, it is desirable to adopt opt-out representative actions which can lower cost and raise benefit of consumer claims but not to adopt opt-out class actions mounted by claims lawyers.

In order to encourage efficient and effective competition enforcement, Korea should also reconsider the role of the KFTC because actions for damages and enforcement by public authorities are necessarily interrelated. For instance, as shown in the US, follow-on actions can help private parties to bring damages actions by ameliorating the burden of proof. [37] Stronger law enforcement by the KFTC has been hindered and limited because of its limited investigative powers under the current competition law. To launch effective investigations against anticompetitive activities, the government should review the possibility of providing the KFTC with judicial powers like those of Public Prosecutor's Office. In Korea, only Public Prosecutor's Office has the power of investigation without any pre-notice. Thus, for effective and efficient public enforcement, it is desirable the KFTC has this investigative power, especially for cartel.

---

[37] See section 1.3.1.4 which deals with stand-alone and follow-on actions.

Any changes to procedures and practices in private damages actions in Korea, should be mindful that, unlike the US, the primary mechanism for enforcing the competition rules in Korea is through public enforcement. Korea should not abandon its concepts of compensatory damages, fairness and the avoidance of unjust enrichment in order to use private actions as the primary deterrence mechanism. Private actions should be encouraged as a complement and as the only way that victims can recover their losses.

Bibliography

Books

A. G. Dorée, "Collusion in the Dutch Construction Industry", Routledge, 2005

Alison Jones and Brenda Sufrin, "EC Competition Law", 3rd ed., Oxford, 2007

Assimakis P Komninos, "EC Private Antitrust Enforcement: Decentralised Application of EC Competition Law by National Courts", Hart Publishing, 2008

Chrisotper Bellamy & Graham D. Child, "Common Market Law Of Competition"(3d ed.),Sweet & Maxwell,1987

Claus Dieter Ehlermann & Isabela Atanasiu(ed.) "European Competition Law Annual 2001: Effective Private Enforcement of EC Antitrust Law" , Hart Publishing, 2003

Clifford A. Jones, "Private Enforcement of Antitrust Law in the EU, UK and USA", Oxford, 1999

David Oughton and John Lowry, "Textbook on Consumer Law"(2nd ed.), Blackstone Press, 2000

Deborah Hensler et al., "Preliminary Results of the RAND Study of Class Action Litigation", RAND corporation, 1997

Debra J. Pearlstein, Robert E. Bloch and Ronan P. Harty, "Antitrust Law Development", 5th ed, American Bar Association, 2002

Earl W. Kintner, "The Legislative History of the Federal Antitrust Laws and Related Statues", Chelsea House Publishers, 1978

E. Thomas Sullivan & Jeffrey L. Harrison, "Understanding Antitrust And Its Economic Implications"(2nd ed.), Matthew Bender & Co, 1994

H. Thorelli, "The Federal Antitrust Policy ", Johns Hopkins University Press, 1954

Herbert Hovenkamp, "Economics and Federal Antitrust Law", West pub., 1985

Herbert Hovenkamp, "Federal Antitrust Policy: The Law of Competition and Its Practice"(2nd ed.), West pub., 1999

Heuston, R. F. V. and R. A. Buckley, "Salmond and Heuston on the Law of Torts"(21st ed.), Sweet & Maxwell, 1996

Jenny Steele, "Tort Law: Text, Cases, and Materials- chapter 8 Damages, compensation and Responsibility", Oxford, 2007

Jürgen Basedow, "Private Enforcement of EC Competition Law", Kluwer Law, 2007

Kenneth G. Elzinga and William Breit, "The Antitrust Penalities: A Study in Law and Economics", Yale University Press, 1976

Kenneth G. Elzinga and William Breit, "Antitrust Penalty Reform: An Economic Analysis", American Enterprise Institute for Public Policy Research, 1986

Lawrence H. White ed., "Private Antitrust Litigation: New Evidence, New Learning (Regulation of Economic Activity)", MIT Press, 1987

Mark Furse, "Competition Law of the EC and UK"(6th ed.), Oxford, 2007

Milton Handler et al., "Trade Regulation", Foundation Press, 1997

Peter Cane, "The Anatomy of Tort Law", Oxford: Hart Publishing, 1997

Victor E. Schwrtz et al., "Wade and Schwartz's Torts",(10th ed.), 2000

Richard A. Posner, "Antitrust Law: An Economic Perspective", Chicago, 1976

Richard A. Posner, "Economic Analysis of Law"(6th ed), Aspen, 2002

Richard A. Posner, "Antitrust Law"(2nd ed.), The University of Chicago Press, 2001

Richard A. Posner & Frank H Easterbrook, "Antitrust Cases, Economic Notes, And Other Materials"(2nd ed.), West, 1981

Richard Whish , "Competition Law"(5th ed.), 2003

Robert Cooter and Thomas Ulen, "Law and Economics" (4th ed.), Pearson Addison Wesley, 2004

Robert H. Bork, "The Antitrust Paradox", Free Press, 1993

Roger D. Blair and David L. Kaserman, "Antitrust Economics", Richard Irwin,1985

Steven Shavell, "Foundations of Economic Analysis of Law", Cambridge, MA: Harvard University Press, 2004.

Tim Ward and Kassie Smith, "Competition litigation in the UK", Thomson, 2005

W. Kip Viscusi, "Reforming Products Liability", Harvard University Press, 1991

W. Page Keeton et al., "Prosser and Keeton on the Law of Torts" (5th ed). West publishing,1984

Wouter P. J. Wils, "The Optimal Enforcement of EC Antitrust Law: Essays in Law and Economics ", Kluwer Law International, 2002

Articles

ABA Section of Antitrust Law, "Monograph No. 13, Treble-Damages Remedy", 1986

ABA Section of Antitrust Law, The State of Federal Antitrust Enforcement: Report of the Task Force on Federal Antitrust Agencies, 2001

Alan Riley, "EC Antitrust Modernization: The Commission Does Very Nicely-Thank You! Part 1: Regulation 1 and the Notification Burden", 24 European Competition Law

Review 604, 2003

Alan Riley, "EC Antitrust Modernisation: The Commission Does Very Nicely –Thank You! Part 2: Between the Idea and the Reality: Decentralisation under Regulation 1", 24(11) European Competition Law Review 657, 2003

Alfred L Parker, "The Deterrent Effect of Private Treble Damage Suite: Facts or Fantasy," 3 New Mexico Law Review 286, 1973

Amanda Kay Esquibel, "Protecting Competition: The Role of Compensation an Deterrence for Improved Antitrust Enforcement", 41 Florida Law Review 153, 1989

Ameet Sachdev, "Coupon Awards Reward Whom? Class-Action Settlements That Pay Lawyers Millions of Dollars and Give Plaintiffs Coupons that are Sometimes Useless Are Drawing Ire in Congress and Some Courts", Chicago Tribune, Feb. 29, 2004

American Bar Association Section of Antitrust law, "Comment on remedial use of disgorgement", 2002

A. Mitchell Polinsky, "Detrebling versus Decoupling Antitrust Damages: Lessons from the Theory of Enforcement," 74 Georgetown Law Journal1231, 1986

A. Mitchell Polinsky, "Private Versus Public Enforcement of Fines", 9 Journal of Legal Studies 105, 1980

A. Mitchell Polinsky and Steven Shavell, "The Optimal Tradeoff Between the Probability and Magnitude of Fines", 69 American Economic Review 880, 1979

A. Mitchell Polinksy and Steven Shavell, "Punitive Damages and Economic Analysis", 111 Harvard Law Review 869, 1998

A. Mitchell Polinsky and Steven Shavell, "Should Liability Be Based on the Harm to the Victim or the Gain to the Injurer?", 10 Journal of Law, Economics and Organization 427,1994

Andrew Amer, "United States Supreme Court Strengthens Standards Enforcing Due

Process Limitations on Punitive Damage Awards", Simpson Thacher & Bartlett LLP, 2003

Andrew I. Gavil, "Antitrust Remedy Wars Episode I: Illinois Brick from inside the Supreme Court", 79(3) Saint John's Law Review 553, 2005

Andrew I. Gavil, "Federal Judicial Power and the Challenges of Multi jurisdictional Direct and Indirect Purchaser Antitrust Litigation", 69 George Washington Law Review 860. 2001

Andrew I. Gavil, "Before the Antitrust Modernization Commission Panel II: State Indirect Purchaser Actions: Proposals for Reform", Federal Trade Commission, Washington, D.C., June, 2005,

Andrew Lockley, "Regulating Group Actions", 139 New Law Journal 798, 1989

Antitrust, "Making Waves: Interview with EU Commissioner for Competition Neelie Kores", 22-SPG Antitrust 47, 2008

A. Neil Campbell and J.William Rowley, "The Internationalization of Unilateral Conduct Laws—Conflict, Comity, Cooperation and/or Convergence?", 75 Antitrust L.J.267, 2008

Antonio Capobianco, "Private antitrust enforcement of EC competition rules: recent developments" Competition Law Insight(November 23), 2004

Antonio Capobianco, "Civil Actions---Europe---Private Antitrust Enforcement of EC Competition Rules: Recent Development", Competition Law Insight 25(3), 2004

A. Paul Victor and Eva W. Cole, "U.S. Private Antitrust Treble Damages Class Actions", Asia International Competition Conference, 2008

Arthur R. Miller, "Of Frankenstein Monsters and Shining Knights: Myth, Reality, and the "Class Action Problem"", 92 Harvard Law Review 672,1979

Arundel McDougall and Alexandra Verzariu, "Vitamins Litigation: Unavailability of

Exemplary Damages, Restitutionary Damages and Account of Profits in Private Competition Law Claims", E.C.L.R.,29(3), 2008

Ashurst, "Executive summary and overview of the national report for Germany", 2004

Ashurst, "Study on the Conditions of Claims for Damages in Case of Infringement of EC Competition Rules- Comparative Report", prepared by Waelbroeck, Slater and Even-Shoshan for the European Commission, 2004

Assimakis P. Komninos, "New prospects for private enforcement of EC competition law: Courage v. Crehan and the Community right to damages", 39 Common Market Law Review 447, 2002

Assimakis P. Komninos, "Public and Private Antitrust Enforcement in Europe: Complement? Overlap?", 3(1) Competition Law Review 5, 2006

August J. Braakman, "The Application of the Modernized Rules Implementing Articles 81 and 82 EC Treaty in Injunction Proceedings: Problems and Possible Solutions", in: Annual Proceedings of the Fordham Corporate Law Institute 1999, 2000, 161-179

A Waller, "Decentralization of the Enforcement Process of the EC Competition Law-- The Greater Role of National Courts" , L.I.E.I., 1996, I.

Barry E. Hawk, "Antitrust in the EEC--The First Decade", 41 Fordham L. Rev. 229, 1972

Barry F. McNeil and Beth L. Fancsali, "Mass Torts and Class Actions: Facing Increased Scrutiny", 167 Feferal Rules Decisions 483, 1996

Barry Rodger, "Private Enforcement of Competition Law, The Hidden Story : Competition Litigation Settlements in the United Kingdom, 2000-2005", 29(2) E.C.L.R.96, 2008

Barry Rodger, "Competition Law Litigation in the UK Courts: A Study of All Cases to 2004 - part I", 27(5) European Competition Law Review 241, 2006: "- part II", 27(6) European Competition Law Review 279, 2006:"-part III", 27(8) European Competition

Law Review 341, 2006

Barry J. Rodger and Angus MacCulloch, "Competition Law Enforcement in the Community. Deregulation and Re-regulation: The Commission, National authorities and Private Enforcement", 4 Columbia Journal of European Law 579,1998

Barry J. Rodger, "Private Enforcement and the Enterprise Act : An Exemplary System of Awarding Damages", 24 European Competition Law Review 103, 2003

Bench Memo, Illinois Brick Co. v. Illinois (No. 76-404), from Richard Meserve to Harry A. Blackmun, Mar.19, 1977

Benjamin Kaplan, "Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure (I)", 81 Harvard Law Review 356, 1967

Beverley Robertson, "What is a Restriction of Competition? The Implications of the CFI's Judgment in O2 Germany and the Rule of Reason", 28 European Competition Law Review 252, 2007

Bobtail Bench Memo, Illinois Brick Co. v. Illinois (No. 76-404), from Gene Comey to Lewis F. Powell, Jr., (Mar. 23, 1977)

Brian Kennelly, "The Defence of 'Passing On'", Bar European Group Annual Conference, Cyprus, 2005

Bruce L. Hay, "Asymmetric Rewards: Why Class Actions (May) Settle for Too Little", 48 Hastings Law Journal 479, 1997

Business Week online "Top 100 Global brands interactive Table" available at http://bwnt.business week.com/brand / 2007

Carlo Petrucci, "The Issues of the Passing on Defence and Indirect Purchasers' Standing in European Competition Law", E.C.L.R., 29(1),2008

Charles A. Sullivan, "Breaking Up the Treble Play: Attacks on the Private Treble Damage Antitrust Action", 14 Seton Hall Law Review 17, 1983

Charles B. Casper, "The Class Action Fairness Act's Impact on Settlement", 20 Antitrust 26, 2005

Charles E. Koob, "Civil Enforcement at the Antitrust Division and Federal Trade Commission: Emerging Patterns", Simpson Thacher & Bartlett LLP, 2002

Charles E. Koob, David E. Vann, Arman Y. Oruc, "Developments in Private Enforcement of Competition Laws- Introduction", Simpson Thacher & Bartlett LLP, 2004

Christina PoncibÒ, "Regulation and Private Litigation: A Debate Over the European Perspective",

Christian Diemer, "The Green Paper on Damages Actions for Breach of the EC Antitrust Rules", 27 European Competition Law Review 309, 2006

Christian A. Heinze, "Discussion: Private Enforcement of EC Competition Rules in the ECJ- Courage v. Crehan and the Way Ahead", in 「Private Enforcement of EC Competition Law」 (ed. by Jürgen Basedow), Kluwer Law, , 2007

Christian Miege, "Modernization and Enforcement Pluralism-The Role of Private Enforcement of Competition Law in the EU and the German Attempts in the 7th Amendment of the GWB", Amsterdam Centre for Law and Economics Workshop: 'Remedies and Sanctions in Competition Policy', 2005

Christoph G. Lang, "Class Actions and the US Antitrust Laws: Prerequisites and Interdependence of the Implementation of a Procedural Device for the Aggregation of Low-Value Claims" 24(2) World Competition 285, 2001

Christopher Hodges, "Europeanization of Civil Justice: Trends and Issues", 26 Civil Justice Quarterly 96, 2007

Christopher Hodges, "Multi-Party Actions: A European Approach", 11 Duke Journal of Comparative and International Law 321, 2001

Statement of Chauncey H. Browning in "Antitrust Enforcement Act of 1979, S. 300": Hearings Before the Senate Committee on the Judiciary, 96th Cong., 1st Sess., at 69-77, 1979

Clare Deffense, "A Farewell to Arms: The Implementation of a Policy-Based Standing Analysis in Antitrust Treble Damages Actions", 72 California Law Review 437,1984

Clifford A. Jones, "After the Green Paper: The Third Devolution in European Competition Law and Private Enforcement", 3(1) Competition Law Review 2, 2006

Clifford A. Jones, "Exporting Antitrust Courtrooms to the World: Private Enforcement in a Global Market", 16 Loyola Consumer Law Review 409, 2004

Clifford A. Jones, "A New Dawn for Private Competition Law Remedies in Europe? Reflections from the USA", EUI-RSCAS/EU Competition 2001/Proceedings, 2001

Clifford A. Jones, "Private Antitrust Enforcement in Europe : A Policy Analysis and Reality Check", 27(1) World Competition 13, 2004

Corinne Bergen, "Generating Extra Wind in the Sails of the EU Antitrust Enforcement Boat", 5 Journal of International Business and Law 203, 2006

Cornelis Canenbley and Michael Rosenthal, "Co-operation Between Antitrust Authorities in –And Outside the EU: What Does it Mean for Multinational Cooperations: Part 1", 26(2) European Competition Law Review 106, 2005

Cristina Poncibò, "Regulation and Private Litigation: A Debate Over the European Perspective", 2nd Mises Seminar, 2005

Curtis R. Taylor, "Indirect Damages from Price Fixing: The Alabama Lysine Case", 18 Review of Industrial Organization 33, 2001

D. Jarrett Arp, "The Changing Face of Class Action Litigation: The Class Action Fairness Act Cover Story Introduction- Be Careful What You Ask For Be Careful What You Ask For: Unintended Consequences and Unfinished Business under the Class Action Fairness Act", Antitrust, Fall 2005

Damien Geradin, "Competition between Rules and Rules of Competition: A Legal and Economic Analysis of the Proposed Modernization of the European of EC Competition Law", 9 Columbia Journal of European Law 1, 2002

Dan Wilsher, "The Public Aspects of Private Enforcement in EC law: Some Constitutional and Administrative Challenges of a Damages Culture", The Competition Law Review, 2006

David Balto, "Returing to the Elman Vision f the Federal Trade Commission: Reassessing the Approach to FTC Remedies", 72(3) Antitrust Law Journal 1113, 2005

David Besanko and Daniel F. Spulber, "Antitrut Enforcement under Asymmetric Information", 99 Economic Journal 408, 1989

David Besanko and Daniel F. Spulber, "Are Treble Damages Netural? Sequential Equilibrium and Private Antitrust Enforcement", 80(4) American Economic Review 870, 1990

David J. Gerber and Paolo Cassinis, "The Modernization of European Community Competition Law: Achieving Consistency in Enforcement: Part 1", 27 European Competition Law Review 10, 2006

David J. Gerber, "The Transformation of European Community Competition Law?", 35 Harvard International Law Journal 97, 1994

David Klingsberg, "Balancing the Benefits and Detriments of Private Antitrust Enforcement: Detrebling, Antitrust Injury, Standing, and Other Proposed Solutions", 9 Cardozo Law Review 1218, 1987-1988

David Resenberg and James P. Sullivan, "Coordinating Private Class Action and Public Agency Enforcement of Antitrust Law", Journal of Competition Law and Economics, 2006.

Deborah R. Hensler, "Revisiting the Monster: New Myths and Realities of Class Action and Other Large Scale Litigation", 11 Duke Journal of Comparative and International

Law 179, 2001

Declan J. Walsh, "Carrots and Sticks- Leniency and Fines in EC Cartel Cases", ECLR 30(1), 30-35, 2009

"Developments in the Law – The Paths of Civil Litigation", 113 Harvard Law Review 1806, 2000

Diane P. Wood, "Antitrust at the Global Level", 72 University of Chicago Law Review , 2005

Donald I. Baker, "Federalism and Fertility: Hitting the Potholes on the Illinois Brick Road", 17 Antitrust 14, Fall 2002

Donald I. Baker, "Restating Law and Refining Remedies: The Trading Company Act, The Joint Research Act and The Local Government Antitrust Act", 55 Antitrust Law Journal, 1986

Donald I. Baker, "Revisiting History – What Have We Learned About Private Antitrust Enforcement That We Would Recommend to Others?", 16 Loyola Consumer Law Review 379, 2004

Donald I. Baker, "The Use of Criminal Law Remedies to Deter and Punish Cartels and Bid-Rigging," 69 George Washington Law Review, 2001

Donald I. Baker, "25Years Later: Walking in the Footsteps of Brunswick, Illinois Brick, and Sylvania Cover Story: Federalism and Futility: Hitting the Potholes on the Illinois Brick Road", 17-FALL Antitrust 14, 2002.

Donncadh Woods, "Private Enforcement of Antirust Rules: Modernization of the EU Rules and the Road Ahead", 16 Loyola Consumer Law Review 431, 2004

Donncadh Woods, Ailsa Sinclair and David Ashton, "Private Enforcement of Community Competition Law: Modernisation and the Road Ahead", 2 EC Competition Policy Newsletter 31, 2004

Douglas H. Ginsburg, "Comparing Antitrust Enforcement in the United States and Europe", 1 Journal of Competition Law and Economics 427, 2005

Edward A. Snyder and Thomas E. Kauper, "An Inquiry into the Efficiency of Private Antitrust Enforcement: Follow-on and Independently Initiated Cases Compared", 74 Georgetown Law Journal 1166, 1986

Edward A. Snyder, "Efficient Assignment of Rights to Sue for Antitrust Damages", 28(2) Journal of Law and Economics 469, 1985

Edward A. Snyder and Thomas E. Kauper, "Misuse of the Antitrust Laws: The Competition Plaintiff", 90 Michigan Law Review 551, 1991

Edward D. Cavanagh, "Detrebling Antitrust Damages in Monopolization Cases", 76 Antitrust L.J. 97, 2009

Edward D. Cavanagh, "Antitrust Remedies Revisited", 84 Oregon Law Review 147, 2005

Edward D. Cavanagh, "Detrebling Antitrust Damages: An Idea Whose Time Has Come?", 61 Tulane Law Review 777. 1987

Edward F. Sherman, "American Class Actions: Significant Features and Developing Alternatives in Foreign Legal Systems", 215 Federal Rules Decisions 130, 2003

Edward P. Henneberry, "Private Enforcement in EC Competition Law: The Green Paper on Damages Actions- The Passing-on Defenses and Standing for Indirect Purchasers, Representative Organizations and Other Groups", Heller Ehrman, LLP, 2006

Eleanor M. Fox, "We Protect Competition, You Protect Competitors", 26(2) World Competition 149, 2003

Elena Wind, "Remedies and Sanctions in Article 82 of the EC Treaty", 26 European Competition Law Review 659, 2005

Emil Paulis, "Policy Issues in the Private Enforcement of EC Competition Law", in

"Private Enforcement of EC Competition Law"(ed. by Jürgen Basedow), Kluwer Law, 2007

Emory M. Sneeden, "Illinois Brick–Do We Look to the Courts or Congress", 24(2) Antitrust Bulletin 205, 1979

Eric McCarthy, Allyson Maltas, Matteo Bay and Javier Ruiz-Calzado, "Litigation culture and versus enforcement culture : A comparison of US and EU plaintiff recovery actions in antitrust cases", The Antitrust Review of the Americas, 2007, p.

Federalist Society, "Analysis: Class Action Litigation--A Federalist Society Survey", 1 Class Action Watch 1, 1999

Fergus Randolph and Aidan Robertson, "The First Claims for Damages in the Competition Appeal Tribunal", 26(7) European Competition Law Review 365, 2005

Firat Cengiz, "Passing on Defense and Indirect Purchaser Standing in Actions for Damages against the Violations of Competition Law: what can the EC learn from the US"?,CCP Working Paper 07-21, 2007

Foad Hoseinian, "Passing on Damages and Community Antitrust Policy : An Economic Background", 28(1) World Competition 3, 2005

Francis G. Jacobs, "Civil Enforcement of EEC Anti-trust Law", 82 Michgan Law Review 1364, 1984

Francisco Marcos and Albert Sánchez Graells, "Damages for breach of the EC antitrust rules: harmonising Tort Law through the back door?", InDret, 2008, p. 9, available www. Indirect.com.

Frank H. Easterbrook, "Detrebling Antitrust Damages", 28 J.L. Econ.445, 1985.

Frank H. Easterbrook and Fischel D. R., "Antitrust Suits by Targets of Tender Offers", 80 Michigan Law Review 1155, 1982

Frank H. Easterbrook, "Predatory Strategies and Counterstrategies", 48 University of

Chicago Law Review 263. 1981

Frank H. Easterbrook, "The Limits of Antitrust", 63 Texas Law Review 1, 1984

Franklin M. Fisher, "Economic Analysis and Antitrust Damages", 29(3) World Competition 383, 2006

Frederick M. Rowe, "The Decline of Antitrust and the Delusions of Models: The Faustian Pact of Law and Economics", 72 Georgetown Law Journal 1511, 1984

Freshfields Bruckhaus Deringer, "Facilitating compensation for breach of competition rules: the White Paper", April 2008

Gary S. Becker, "Crime and Punishment: An Economic Approach", 76 Journla of Political Economy 169, 1968

Georg Berrisch, Eve Jordan, Rocio Salvador Roldan, "EU Competition and Private actions for Damages", 24(3) Northwestern Journal of International Law and Business 585, 2004

George L. Priest, "What We Know and What We Don't Know About Modern Class Actions: A Review of the Eisenberg-Miller Study", Manhattan Institute for Policy Research, Civil Justice Report No. 9, February 2005

Geraldine Alexis, Andrea Deshazo, "Punitive Damages: Is Bifurcation Right for Your Case?", Antitrust Magazine, 2002.

Gerry Facenna, "Restructuring UK Competition Courts and Tribunals: A Summary", 1 Comp. L.J. 56, 2002

Gregory G. Wrobel and Michael J. Waters, "Early Returns: Impact of the Class Action Fairness Act on Federal Jurisdiction Over State Law Class Actions", 21 Antitrust, Fall 2006

Gregory P. Olsen, "Actions for damages are Compensation and deterrence? The passing on defence and the future direction of UK private proceedings", Competition Law

Insight 4.8(3) , 2005

Gregory P. Olsen, "Enhancing Private Antitrust Litigation in the EU", 20 Antitrust 73, Fall 2005

Gregory P. Olsen, "The Changing Face of Class Action Litigation: The Class Action Fairness Act Development International Development - Enhancing Private Antitrust Litigation in the EU", Antitrust, 2005

Gregory V.S. McCurdy, "The Impact of Modernization of the EU Competition Law System on the Courts and Private Enforcement of the Competition Laws: A Comparative Perspective", 25 European Competition Law Review 509, 2004

Hannah L. Buxbaum, "Private Enforcement of Competition Law in the Untied States- of Optimal Deterrence and Social Costs", in 「Private Enforcement of EC Competition Law」 (ed. by Jürgen Basedow), KLUWER LAW, 2007

Harry First, "Antitrust Law", Fundamentals of American Law 427, 1996

Harry First, "Controlling the Intellectual Property Grab: Protect Innovative, not Innovators", Rutgers Law Journal, 2007

Hart-Scott-Rodino Memo, Illinois Brick Co. v. Illinois (No. 76-404), from Richard Meserve to Harry A. Blackmun, Mar. 23. 1977

Herbert Hovenkamp, "The Indirect Purchaser Rule and Cost-Plus Sales", 103 Harvard Law Review 1717, 1990

Herbert J. Hovenkamp, "Treble Damages Reform", 33 Antitrust Bulletin 233, 1988

Herbert J. Hovenkamp, "United States Antitrust Policy in an Age of IP Expansion", Berkeley Center for Law and Technology, 2005

Hoffman D. Bruce, "To Certify or Not : A Modest Proposal for Evaluating the "Superiority" of a Class Action in the Presence of Government Enforcement", 18 Georgetown Journal of Legal Ethics 1383, 2005

Holmes K., "Public Enforcement or Private Enforcement? Enforcement of Competition Law in the EC and UK", 1 European Competition Law Review 25, 2004

Hoskins, H., "Garden Cottage Revisited: The Availability of Damages in the National Courts for Breaches of the EEC Competition Rules" [1992] 6 E.C.L.R. 257

Ian Simmons and Charles E. Borden, "The Defence Perspective: The Class Actions Fairness Act of 2005 and State Law Antitrust Actions", Antitrust, Fall 2005

Ilya Segal and Michael Whinston, " Public VS Private Enforcement of Antitrust Law: A Survey", 5 European Competition Law Review 306, 2007

Irina Haracoglou, "Competition Law, Consumer Policy and the Retail Sector: the systems' relation and the effects of a strengthened consumer protection policy on competition", Competition Law Review, 2007

Jakob Rüggeber and Maarten Pieter Schinkel, "Consolidating Antitrust Damages in Europe: A Proposal for Standing in Line with Efficient Private Enforcement", 29 World Competition 395, 2006

J. Edelman and O. Odudu, "Compensatory Damages for Breaches of Article 81" (2002) 27 E.L. Rev. 327.

J. Harrington, "Corporate Leniency Programs and the Role of the Antitrust Authority in detecting Collusion", International Symposium in Japan Fair Trade Commission, 2006

Jan M. Smits, "A European Law on Unjustified Enrichment? A Critical View of the Law of Restitution in the Draft Common Frame of Reference", in 「 European Private Law Beyond the Common Frame of Reference」 ed. Antoni Vaquer, 2008

Jeremy Lever QC, "Effective Private Enforcement of EC Antitrust Rules Substantive Remedies: the viewpoint of an English lawyer", in 「European competition law annual 2001」 (ed. by Claus Dieter Ehlermannn and Isabela Atanasiu). Hart Publishing, 2003

Jim Burke, "Carnival Settles Lawsuit", Boston Herald, Apr. 1, 2001

Joel Davidow, "Competition Policy, Merger Control and the European Community's 1992 Program", 29 Columbia Journal of Transnat'l Law 11,1991

Joel M. Cohen and Trisha Lawson, "Navigating Multistate Indirect Purchase Lawsuit", 15 Antitrust 29, 2001

Johan Ysewyn, "Private Enforcement of Competition Law in the EU: Trials and Tribulations", International Law Practice, 2006

John C. Coffee, "Class Wars: The Dilemma of the Mass Tort Class Action", 95 Columbia Law Review 1343, 1995

John C. Coffee, "Rescuing the Private Attorney General : Why the Model of the Lawyer as Bounty Hunter is not Working, 42 Maryland Law Review 215, 1983

John C. Coffee, "Rethinking the Class Action: A Policy Primer on Reform", 62 Indiana Law Journal 625, 1987

John Calvin Jeffries, Jr., "A Comment on the Constitutionality of Punitive Damages", 72 Virginia Law Review 139, 1986

John D. Guilfoil. "Damage Determination in Private Antitrust Suits," 42 Notre Dame Lawyer 647, 1967

John Fingleton, "De-monopolising Ireland", in European Competition Law Annual (Ehlermann & Atanasiu Eds.), 2003

John Graubert, "Comments on "Civil Remedies Available to the Federal Trade Commission" to the Antitrust Modernization Commission, Federal Trade Commission, 2005

John H. Beisner and Charles E. Borden, "Expending Private Cause of Action: Lessons from the US Litigation Experience", presented at 「The Trans-Atlantic Challenge: Diverging approaches to regulatory and legal reform in the Untied States and Europe」, Brussels, 2005

John H. Beisner and Jessica Davidson Miller, "The Class Action Fairness Act: Cleaning Up the Class Action Mess", 6 BNA Class Action Litigation Report 104, 2005

John Kallaugher and Andreas Weitbrecht, "Articles 81 and 82 EC in 2006-The Year in Review", 28 European Competition Law Review 316, 2007

John Kallaugher and Andreas Weitbrecht, "Developments Under Articles 81 and 82 EC-The Year 2005 in Review, 27 European Competition Law Review 138, 2006

John M. Connor and Yuliya Bolotova, "Cartel Overcharges: Survey and Meta-Analysis", march 2005, available at SSRN: http://ssrn.com/abstract=788884

John M. Desiderio, "Private Treble Damage Antitrust Actions: An Outline of Fundamental Priciples", 48 Brooklyn Law Review 409, 1982.

John Pheasant, "Damages Actions for Breach of the EC Antitrust rules: The European Commission's Green Paper", 27 European Competition Law Review 365, 2006

John Pheasant, "Private Antitrust Damages in Europe: The Policy Debate and Judicial Developments", Antitrust, Fall 2006

John Pheasant, "Private Damages Actions", Competition Law Insight, February 2006

John Pheasant, "Private Damages Actions: Response to the Commission's green paper", Competition Law Insight, August 2006

John Pheasant, "Private Antitrust Damages in Europe: As the Policy Debate Rages, What are the Signs of Practical Progress?", Business Law International Vo.8 No 3, 2007

Jon M. Joyce and Robert H. McGuckin, "Assignment of Rights to Sue under Illinois Brick: An Empirical Assessment", 31(1) Antitrust Bulletin 235, 1986

Jonathan B. Baker, "The Case for Antitrust Enforcement", 17 Journal of Economic Perspectives 27, 2003

Jonathan Sinclair, "Damages in Private Antitrust Actions in Europe", 14 Loyola Consumer Law Review 551, 2002

Joseph A Ostoyich and Arturo DeCastro, "The Increasing risks of US litigation for global companies", Global Competition Review: Antitrust Review of the Americas, 2006

Joseph A Ostoyich and Eric Berman, "Trends in Dominant Firm Litigation: Convergence Towards What?", Global Competition Review: The Antitrust Review of the Americas, 2008

Joseph Gregory Sidak and Michael Block, "The Cost of Antitrust Deterrence: Why Not Hang a Price-Fixer Now and Then?", 68 Georgetown Law Journal 1131, 1980

Joseph Gregory Sidak and Michael Block, "The Deterrent Effect fo Antitrust Enforcemnet", The Journal of Political Economy, 1981

Joseph P. Bauer, "Reflections on the Manifold Means of Enforcing the Antitrust Laws: Too Much, Too Little, or Just Right?", 16 Loyola Consumer Law Review 303, 2004

Joseph P. Bauer, "The Stealth Assault on Antitrust Enforcement: Raising the Barriers for Antitrust Injury and Standing", 62 University of Pittsburgh Law Review 437, 2001

Joseph P. Bauer, "Multiple Enforcer and Multiple Remedy", 16 Loyola Consumer Review 303, 2004

Katarina Pijetlovic, "Reform of EC antitrust enforcement: criticism of the new. system is highly exaggerated", 25(6) European Competition Law Review 356, 2004

Kati J. Cseres, "The impact of Consumer Protection on Competition and Competition law : The Case of Deregulated Markets", Amsterdam Center for Law & Economics Working Paper N0.2006-0

Kenneth G. Elzinga and William Breit, "Private Antitrust Enforcement: The New Learning", 28 Journal of Law and Economics 405, 1985

Kenneth S. Bordens and Irwin A. Horowitz, "Mass Tort Civil Litigation: The Impact of Procedural Changes on Jury Decisions", 73 Judicature 22, 1989

Kon and Maxwell, "Enforcement in National Courts of the EC and New UK Competition Rules: Obstacles to Effective Enforcement" [1998] 7 E.C.L.R. 443

Larue, P. H. and Newton, J. M., "Legislative Progress in Responding to the Illinois Brick Decision", 23 Antitrust Bulletin 273, 1978

Lesley Farrell and Sarah Ince, "UK: Private Enforcement", European Antitrust Review, 2008

Lin Ping et al., "The US Antitrust and Recent Trends In Antitrust Enforcement", 14(3) Journal of Economic Surveys 255, 2000

Louis Kaplow, "Private versus Social Costs in Bringing Suit", 15 Journal of Legal Stucies 371, 1986

Luke R. Tolaini and Anna M. Morfey, "Antitrust Damages Actions in Europe: A Step in the U.S. Direction?", 22-SUM Antitrust 93, 2008

Maarten Pieter Schinkel and Jan Tuinstra, "Imperfect Antitrust Enforcement", Maastricht University research paper, 2002

MacCulloch, A. D. and Barry J. Rodger, "Wielding the Blunt Sword: Interim Relief for Breaches of EC Competition Law before the UK Courts", 7 European Competition Law Review 393, 1996

Magnus Gustafsson and Foad Hoseinian, "Private Enforcement of EC Competition Law: Swedish Supreme Court Judgement on the Validity of Follow on Contracts", 27(1) European Competition Law Review 5, 2006

Magnus Gustafsson, "What are the Prospects for Enhanced Private Antitrust Litigation? A Swedish Perspective", 30(4) European Law Review, 2005

Maher M. Dabbah, "Measure the Success of a System of Competition Law: A

Preliminary View", 21 European Competition Law Review 369, 2000

Malcolm E. Wheeler, "Antitrust Treble-Damage Actions: Do They Work?", 61 California Law Review 1319, 1973

Mario Hilgenfeld, "Private Antitrust Enforcement: Towards a Harmonised European Model or a "Patchwork" of Various Member States' Rules", Int. T.L.R. 14(2), 2008

Margaret M. Zwisler, "State Indirect Purchaser Litigation and U.S. Antitrust Enforcement", Testimony before The Antitrust Modernization Commission, Washington, 2005

Marguerite Higgins, "Class Members Get Little in Suits", Washington Times, July 2, 2004

Marjorie C. Holmes, and Lesley Davey, "Competition Enforcement in the European Union: A Three Way Partnership," 72(1) Defense Counsel Journal 31, 2004

Mark Brealey QC, "Adopt Perma Life, but follow Hanover Shoe to Illinois? – Who Can Sue for Damages for Breach of EC Competition Law?", 1 Competition Law Journal 127, 2002

Mark D. Whitener, "The Changing Face of Class Action Litigation: The Class Action Fairness Act Cover Story-Editor's Note : Exporting Antitrust", Antitrust, Fall, 2005

Mark Furse, "The Role of Competition Policy: A Survey", 17(4) European Competition Law Review 250, 1996

Mark J. Bennett and Ellen S. Cooper, "Concerning Indirect Purchaser Actions", Testimony before the Antitrust Modernization Commission, 2005

Mark Wegener and Peter Fitzpatrick, "Europe Gets Litigious: Class actions and competition enforcement may change Europe's legal culture", Legal Times, 23 May 2005

Mary J. Davis, "Toward the Proper Role for Mass Tort Class Actions", 77 Oregon Law

Review 157, 1998

Matthew C. Stephenson, "Public Regulation of Private Enforcement: The Case for Expanding the Role of Administrative Agencies", 91 Va.L.Rev. 93, 2005.

Michael Harker and Morten Hviid, "Competition Law Enforcement and Incentives for Revelation of Private Information", 31(2) World Competition 279, 2008

Michael Kent Block, Federick Carl Nold, Joseph Gregory Sidak, "The Deterrent Effect of Antitrust Enforcement", The Journal of Political Economy, 1981

Michael L. Denger and D. Jarrett Arp, "Does Our Multifaceted Enforcement System Promote Sound Competition Policy?", 15 Antitrust 41, Summer 2001

Michael P. Foradas, "Private Enforcement of the Antitrust Laws"(607 PLI/Corp 225), Corporate Law and Practice Course Handbook Series - Practicing Law Institute, 1988

Michael Paulweber , "The End of a Success Story?: The European Commission's White Paper on the Modernisation of the European Competition Law: A Comparative Study about the Role of the Notification of Restrictive Practices within the European Competition and the American Antitrust Law", 23(2) World Competition 3, 2000

Michael Van Hoof, "Will the New European Union Competition Regulation Increase Private Litigation? An International Comparison", 19 Connecticut Journal of International Law 659, 2004

Michele Carpagnano, "Private Enforcement of Competition Law Arrives in Italy: Analysis of the Judgment of the European Court of Justice in Joined Cases C-295-289/04 Manfredi", 3(1) The Competition Law Review 47, 2006

Mihail Danov, "Awarding Exemplary (or Punitive) Antitrust Damages in EC Competition Cases with an International Element- The Rome II Regulation and the Commission's White Paper on Damages", E, C.L.R.2008, 29(7), 430

Note, "Private Treble Damage Antitrust Suits: Measure of Damages for Destruction of All or Part of a Business", 80 Harvard Law Review 1566, 1967

Paolisa Nebbia, "Damages Actions for the Infringement of EC Competition Law: Compensation or Deterrence", 33 European Law Review 23, 2008

Paolo Giudici, "Private Antitrust Law Enforcement in Italy", 1 Competition Law Review 61, 2004

Patricia Hanh Rosochowicz, "Deterrence and the relationship between public and private enforcement of competition law", Amsterdam Centre for Law and Economics Workshop, 2005

Paul Friedman, David Gelfand and Christina Nordlander, etc., "Comments of the Section of Antitrust Law and the Section of International Law of the American Bar Association in Response to the Request for Public Comment of the Commission of the European Communities On Damage Actions for Breaches of EU Antitrust Rules", ABA, 2006

Paul Hughes, "The Enforcement of Private Actions for Breaches of EC Competition Law-The Role of the Shareholder under English Law", 3 Competition Law Review 73, 2006

Paul V. Niemeyer, "Awards for Pain and Suffering: The Irrational Centerpiece of Our Tort System", 90 Virginia Law Review 1401, 2004

Peter Behrens, "Comments on Josef Drexl: Choosing between Supranational and International Law Principles of Enforcement", in: Drexl (Ed.), The Future of Transnational Antitrust - From Comparative to Common Competition Law, Kluwer Law International, 2003

Peter H. Schuck, "Mass Torts: An Institutional Evolutionist Perspective", 80 Cornell Law Review 941, 1995

Peter M. Gerhart, "The Supreme Court and Antitrust Analysis: The Triumph of the Chicago School", The Supreme Court Review, Vol. 1982, 1982

Peter S. Menell, "A Note on Private Versus Social Incentives to Sue in a Costly Legal

System", 12 J.Legal Stud.41, 1983.

Philip Haberman, "Quantifying antitrust damages: Flexibility rather than prescription is the best approach", Competition Law Insight, May 2006.

Philip Lowe, "Current Issues of E.U. Competition Law: The New Competition Enforcement Regime", 24(3) Northwestern Journal of International Law and Business 567, 2004

Randolph Preston McAfee, Hugo M. Mialon and Sue H. Mialon, "Private Antitrust Litigation: Procompetitive or Anticompetitive?"(August 16, 2005). Emory Law and Economics Research Paper No. 05-18 available at SSRN: http://ssrn.com/abstract=784805

Randolph Preston McAfee, Hugo M. Mialon and Sue H. Mialon, "Private v. Public Antitrust Enforcement: A Strategic Analysis". Emory Law and Economics Research Paper No. 05-20 available at SSRN: http://ssrn.com/abstract=775245

Renato Nazzini, "The Wood Began to Move : An Essay on Consumer Welfare, Evidence and Burden of Proof in Article 82 Cases", 31 European Law Review 518, 2006

Richard A. Posner, "Antitrust In The New Economy", 68 Antitrust Law Journal 935, 2001

Richard A. Posner, "The Ethical and Political Basis of the Efficiency Norm in Common Law Adjudication", 8 Hofstra Law Review 487, 1980

Roach K. & Trebilcock M.J., "Private Enforcement of Competition Laws", (1996) 34 Osgoode Hall L.J. 461, 1996

Robert H. Lande, "Are Antitrust "Treble Damages" Really Single Damages?", 54 Ohio State Law Journal 115, 1993

Robert H. Lande, "Wealth Transfers as the Original and Primary Concern of Antitrust: The Efficiency Interpretation Challenged", 34 Hastings Law Journal 67, 1982

Robert H. Lande, " The rise and (Coming) Fall of Efficiency as the Ruler of Antitrust, 33 Antitrust BULL. 429, 1988.

Robert H. Lande, "Why Antitrust Damage Levels Should Be Raised", 16 Loyola Consumer Law Review 329, 2004

Robert H. Lande and Joshua P. Davis, "Benefits from Private Antitrust Enforcement : An Analysis of Forty Cases", 42 University of San Francisco Law Review 879, 2008

Robert G. Harris and Lawrence A. Sullivan, "Passing on the Monopoly Overcharge: A Comprehensive Policy Analysis", 128(2) University of Pennsylvania Law Review 269, 1979

Robert L. Hubbard and James Yoon, "How the Antitrust Modernization Commission Should View State Antitrust Enforcement", 17 Loyola Consumer Law Review 497, 2005

Robert McNary, "Optimal Deterrence with Public and Private Antitrust Enforcement", University of Chicago Law school, Law and Economics Workshop, 2006

Robert Pitofsky, "Past, Present, and Future of Antitrust Enforcement at the Federal Trade Commission", 72 University of Chicago Law Review 209, 2005

Robert Pitofsky, "The Political Content of Antitrust" , 127 University of Pennsylvania Law Review 1501,1979

Robert Pitofsky, "Antitrust at the Turn of the Twenty-First Century : The Matter of Remedies", 91 Geo.L.J.169, 2002

Robert W. Crandall, Clifford Winston, "Does Antitrust Policy Improve Consumer Welfare? Assessing the Evidence", Journal of Economic Perspectives vol. 17, 2003

Robert W. Stedman, "Consent Decrees and Private Actions: An Antitrust Dilemma", 53 California Law Review 627, 1965

Roger D. Blair and Christine A. Piette, "Coupons and Settlements in Antitrust Class

Actions", 20 Antitrust 32, 2005

Roger D. Blair and William H. Page, "Controlling the Competitor Plaintiff in Antitrust Litigation", 91 Michigan Law Review 111, 1992

Roger D. Blair and William H. Page, "Speculative Antitrust Damages", 70 Washington Law Review 423, 1995

Roger H. Trangsrud, "Mass Trials in Mass Tort Cases: A Dissent", 1989 University of Illinois Law Review 69, 1989

Ronald Cotterill, Leonard Egan, William Buckhold, "Beyond Illinois Brick: The Law and Economics of Cost Pass-through in the ADM Price Fixing Case", 18(1) Review of Industrial Organization 45, 2001

Ronald H. Coase, "The Problem of Social Costs", 3 Journla of Law and Economics 1, 1960

Ronald W. Davis, "Standing on Shaky Ground: The Strangely Elusive Doctrine of Antitrust Injury", 70 Antitrust Law Journal 697, 2003

Rossella Incardona, "The Corte Di Cassazione Takes Courage. A Recent Ruling Opens Limited Rights for Consumers in Competition Cases", 26(8) European Competition Law Review, 2005

Shaw Jo, "Decentralization and Law Enforcement in EC Competition Law", 15 Legal Studies 128, 1995

Sonya Margaret Willimsky, "The Concept(s) of Competition", 1 European Competition Law Review 52, 1997

Scott D. Hammond, "Detecting and Deterring Cartel Activity through an Effective Leniency Program", Address Before the 「International Workshop on Cartels」, Department of Justice, 2000

Spencer Weber Waller, "Prosecution by Regulation: The Changing Nature of Antitrust

Enforcement", 77 Oregon Law Review 1383, 1998

Spencer Weber Waller, "The Incoherence of Punishment in Antitrust", 78(1) Chicago Kent Law Review 207, 2003

Stephen B. Presser, "How Should The Law of Products Liability Be Harmonized? What Americans Can Learn From Europeans", Global Liability Issues Vol. 2, Center for Legal Policy at the Manhattan Institute, 2002

Stephen Calkins, "An Enforcement Official's Reflections on Antitrust Class Actions", 39 Ariz. L. Rev. 413, 1997

Stephen Watterson, "An Account of Profits or Damages? The History of Orthodoxy", 24 Oxford Journal of Legal Studies 471, 2004

Steven B. Hantler, Mark A. Behrens and Lean Lorber, "Is The Crisis in the Civil Justice System Real or Imagined?", 38 Loyola of Los Angeles Law Review 1121, 2005

Steven B. Hantler and Rebert E. Norten, "Coupon Settlements: The Emperor's Clothes of Class Actions", Georgetown Journal of Legal Ethics, 2005

Steven C. Salop and Lawrence J. White, "Economic Analysis of Private Antitrust Litigation", 74 Georgetown Law Journal 1001, 1986

Steven C. Salop and Lawrence J. White, "Private Antitrust Litigation: An Introduction and Framework", in 「Private Antitrust Legislation : New Evidence, New Learning」 (ed. by L. White), Cambridge, 1988

Steven Shavell, "The Fundamental Divergence between the Private and the Social Motive to Use the Legal System," *26 Journal of Legal* Studies 575, 1997

Steven Shavell, "The Optimal Structure of Law Enforcement", 36 Journal of Law and Economics 255, 1993

Steven Shavell, "The Social versus the Private Incentive to Bring Suit in a Costly Legal System", 11 Journal of Legal Studies 333,1982

Sue Ann Mota, "Hide it or Unbundle: A Comparison of the Antitrust Investigations against Microsoft in the U.S. and the E.U.", 3 Pierce Law Review 183, 2005

Susan P. Koniak and George M. Cohen, "Under Cloak of Settlement", 82 Virginia Law Review 1051, 1996

Sven B. Völcker, "Developments in EC Competition Law in 2003: An Overview", 41 Common Market Law Review 1027, 2004

Sven Norberg, "Some Elements to Enhance Damages Actions for Breach of the Competition Rules in Articles 81 and 82 EC", 32nd Annual International Antitrust Law & Policy Conference, Fordham, New York, 2005

Sweet & Maxwell Limited and Contributors, "Commission Presents Paper on Compensating Victims of Competition Breaches", EU Focus 231, 2008.

Sweet & Maxwell Limited and Contributors, "From Freiburg to Chicago and Beyond-The First 50 Years of European Competition Law", E.C.L.R.29(2), 2008

Tefft W. Smith et al., "Finding the Right Price", Legal Times, Dec. 15, 2003

Thomas D. Rowe, Jr., "Shift Happens: Pressure on Foreign Attorney-Fee Paradigms from Class Actions", 13 Duke Journal of Comparative and International Law 125, 2003

Thomas Greene, "Introduction to the Legal and Economic Issues at the Intersection of the Patent and Antitrust Laws", Sedona Conference Journal, 2007

Thomas Lampert and Georg Weidenbach, "Antitrust Litigation in Germany: Competition Law Insight, July 2005

Timothy J. Muris, "Principles for a Successful Competition Agency", University of Chicago Law Review, 2005

Tim Reher, "The Commission's White Paper on Damages Actions for Breach of the EC Antitrust Rules", European Antitrust Review 2009.

Ulf Boge and Konrad Ost, “Up and Running, or Is It? Private Enforcement –The Situation in Germany and Policy Perspectives”, 27(4) European Competition Law Review, 2006

Van Dijk, R. and Niels, G., "The Economics of Quantifying Damages", 1 Competition Law Journal 69, 2002

Victor E. Schwartz and Leah Lorber, "Death by a Thousand Cuts: How to Stop Multiple Imposition of Punitive Damages", 7:12 Briefly (National Legal Center for the Public Interest. Dec. 2003)

Victor E. Schwartz and Leah Lorber, “Twisting the Purpose of Pain and Suffering Awards: Turning Compensation Into "Punishment", 54 South Carolina Law Review 47, 2002

Victor E. Schwartz, Mark A. Behrens and Leah Lorber, “Federal Courts Should Decide Interstate Class Actions: A Call for Federal Class Action Diversity Jurisdiction Reform”, 37 Harvard Journal on Legislation 483, 2000

Victor E. Schwartz, Mark A. Behrens and Rochelle Tedesco, "Addressing the "Elephant Mass" of Asbestos Cases: Consolidation Versus Inactive Dockets (Pleural Registries) and Case Management Plans that Deter Claims by the Non-Sick", 31 Pepperdine Law Review 271, 2004

Viivi Vanderslice, “Comment, Viability of a Nationwide Fen-Phen/Redux Class Action Lawsuit in Light of Amchem v. Windsor”, 35 California Western Law Review 199, 1998

Walter Van Gerven, “Substantive Remedies For the Private Enforcement of EC Antitrust Rules Before National Courts, in: Ehlermann, C.-D. / Atanasiu, I. (eds.)331 「European Competition Law Annual 2001: Effective Private Enforcement of EC Antitrust Rules」, Oxford, 2003

Walter Van Gerven, “Substantive Remedies for the Private Enforcement of EC Antitrust Rules Before National Courts,” EUI-RSCAS/EU Competition Law and Policy

Workshop, 2001

Warren F. Schwartz, "An Overview of the Economics of Antitrust Enforcement", 68 Georgetown Law Journal , 1980

Warren W. Harris and Erin Glenn Busby, "Highlights of the Class Action Fairness Act", 72 Defense Counsel Journal , 2005

Warren S. Grimes, "The Sherman Act's Unintended Bias against Lilliputians: Small players' Collective Actions as a Counter to Relational Market Power", 69 Antitrust Law Journal, 2001

Whish, R., "The Enforcement of EC Competition Law in the Domestic Courts of Member States" , 2 European Competition Law Review 60, 1994

William Breit, "Efficiency and Equity Considerations", 8 Southwestern University Law Review , 1976

William B. Tye, Stephen H. Kalos, "Antitrust Damages from Lost Opportunities", Practicing Law Institute- Corporate Law and Practice Course Handbook Series, PLI Order No. B0-00D3, 1998

William E. Kovacic, "Private Participation in the Enforcement of Public Competition Laws", British Institution of International & Comparative Law- Third Annual Conference on International and Comparative Competition Law: The Transatlantic Antitrust, 2003

William E. Kovacic, "The Intellectual DNA of Modern U.S. Competition Law for Dominant Firm Conduct: The Chicago/Harvard Double Helix, Colum. Bus. L. Rev. 1, 2007

William M. Landes, "Optimal Sanctions for Antitrust Violations", 50 University of Chicago Law Review. 652, 1983

William M. Landes and Richard A. Posner, "Should Indirect Purchasers Have Standing to Sue Under the Antitrust Laws? An Economic Analysis of the Rule of Illinois Brick",

46 University of Chicago Law Review, 1979

William H. Page, "Antitrust Damages and Economic Efficiency: An Approach to Antitrust Injury", 47 University of Chicago Law Review 467, 1980

William H. Page, "Optimal Antitrust Penalties and Competitors' Injury", 88 Michigan Law Review, 1990

William H. Page, "Policy Choices in Defining the Measure of Antitrust Damages", DAF/COMP/WP3, 2006

William H. Page, "The Scope of Liability for Antitrust Violations", 37 Stanford Law Review,1985

William F. Shughart II, "Private Antitrust Enforcement: Compensation, Deterrence, or Extortion?" Regulation Magazine Vol.12 No. 3, 1990

William J. Kolasky, "Global Competition: Prospects for Convergence and Cooperation", American Bar Association Fall Forum, 2002

W. Kip Viscusi, "Why There Is No Defense of Punitive Damages", 87 Georgetown Law Journal 381, 1998

Wouter P. J. Wils, "Should Private Antitrust Enforcement Be Encouraged in Europe?", 26(3) World Competition 473, 2003

Xinyu Hua and Kathryn E. Spier, "Information and Externalities in Sequential Litigation", 161 Journal of Institutional and Theoretical Economics 215, 2005

Cases

AB v South West Water Services [1993] Q.B. 507.

AEI Rediffusion Music Ltd. v. Phonographic Performance Ltd., 1 W.L.R. 1507 (C.A. 1999) (Eng.)

In re Agent Orange Prod. Liab. Litig., 818 F.2d 145 (2d Cir. 1987)

In re A.H. Robins Co., 880 F.2d 709 (4th Cir. 1989)

Alaska v. Standard Oil Co. of California , 487 F.2d 191 (9th Cir. 1973)

Alyeska Pipeline Service Co. v. Wilderness Soc'y, 421 U.S. 240, 263 (1975)

American Pipe & Const. Co. v. Utah, 414 U.S. 538, 553-54 (1974)

American Soc'y of Mechanical Eng'rs v. Hydrolevel Corp., 456 U.S. 556 (1982)

Amministrazione delle Finanze dello Stato v. SpA San Georgio, Case 199/82, E.C.R.3595(1983)

In re Ampicillin Antitrust Litigation, 55 F.R.D. 269(D.D.C. 1972)

Archer Daniels Midland Co v Commission of the European Communities [2006] 5 C.M.L.R.28

Ariete, Case 811/79, [1980] ECR 2545

Arkin v. Borchard [2002] UKCLR 150

Arkin v. Borchard Lines Ltd and Others [2005] EWCA Civ 655

Armco Steel Corp. v. North Dakota, 376 F.2d 206(8th Cir. 1967)

Associated General Contractors v. California State Council of Carpenters, 459 U.S. 519 (1983)

Atlantic Richfield Co. v USA Petroleum, 495 US 328 (1990)

Banks v. British Coal, Case C-128/92,1994 E.C.R. 1-1209

BCL Old Co Limited and others v. Aventis SA and. others Case No 1028/5/7/04 CAT 2

Béguelin Import Co v. SAGL Import Export, Case 22/71, [1971] E.C.R. 949

Bell Atlantic Corp. v. Twombly, 127 S. Ct. 1955(2007)

Bettercare v Director General of Fair Trading [2002] CAT 6

Bigelow v. RKO Radio Pictures, 327 U.S. 251 (1946)

Blades v. Monsanto Co., 400 F.3d 562 (8th Cir. 2005)

Block v. McDonald's Corporation, (No. 01-409137, Cook County, Illinois, 2002)

Blue Shield of Virginia v. McCready, 457 U.S. 465(1982)

BMW Motorenwerke AG v ALD Auto-Leasing, C-70/93, 1995 ECR I 3439

Brasserie de Haecht v. Wilkin-Janssen, Case 48/72, [1973] ECR 77

Brasserie du Pêcheur v. Bundesrepublik Deutschland and The Queen v. Secretary of State for Transport Ex p. Factortame, Joined Cases C 46 & 48/93, [1996] E.C.R. I-1029

Bristol-myers Squibb Company and Mead Johnson & Company v. Danbury Pharmacal Inc., 26 F.3d 138(1994)

Brooke Group LTD. v. Brown & Williamson Tobacco Corporation, No. 92-466, (1993)

Broome v Cassell & Co [1972] A.C. 1027.

BRT v. SABAM, Case 127/73, [1974] ECR 51

Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477 (1977)

Bunker Glass Co. v. Pilkingto, PCL, 75 P.3d99, 109(Ariz.2003)

Bundeskartellamt v. Volkswagen AG and VAG Leasing GmbH, C-266/93, 1995 ECR I – 3477

California v. ARC Am. Corp., 490 U.S. 93 (1989)

Califonia v. Am. Stores Co., 495 U.S. 271(1990)

Cargill, Inc. v. Monfort of Colorado, Inc., 479 U.S. 104 (1986)

Carroll v Barclay, 1948 S.C. (HL) 100

Castano v. American Tobacco Co., 84 F.3d 734(5th Cir. 1996)

CCE v National Westminster Bank, 2003,S.T.C.1072

Chardon v. Fumero Soto, 462 U.S. 6501983

Chattanooga Foundry & Pipe Works v. City of Atlanta, 203 U.S. 390 (1906)

Joined cases C-192/95 to C -218/95, Comateb and Others v. Directeur général des douanes et droits indirects,[1997] E.C.R. I-165

Condliffe v. Hislop, 1 W.L.R. 753 (C.A. 1996) (Eng.)

Case C-453/99, Courage Ltd. v. Bernard Crehan and Bernard Crehan v. Courage Ltd. and Others, 2001 E.C.R. 1 (Eng. C.A. 1999)

Case C-452/99, Courage v Crehan [2001] E.C.R. I-6297

Cooper Industries, Inc. v. Leatherman Tool Group, Inc., 532 U. S. 424 (2001)

Copperweld Corp. v. Independence Tube Co., 467 U.S. 752(1984)

Courage v Crehan, C-452/99, [2001]ECR I-6297

Crehan v Interpreneur,2004, EWCA Civ 637

Courage Limited v Bernard Crehan(Case – C-453/99) [2002]Q.B.507

Crouch v. Crompton Corp., No. 02 CVS 4375,. 2004 WL 2414027 (N. C. Super. Ct. Oct. 28, 2004)

Cutler v Wandsworth Stadium Ltd (In liquidation),1949, 1 All E.R. 544

Daniels v Thompson, 1998, 3 N.Z.L.R. 22

Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993)

Deans Food Limited v Roche Products Limited Case No 1029/5/7/04

Delimitis v. Henninger Brau AG, Case C-234/89, 1991 E.C.R. I-935

Denkavit Italiana, Case 61/79, [1980] ECR 1205

Dumortier Frères, Case 64 and 113/76, [1979] ECR 3091

Devenish Nutrition Limited v. Sanofi-Aventis SA(France)&ORS, Case A3/2008/0080, [2008]EWCA Civ 1086

In re "East of the Rockies" Concrete Pipe Antitrust Cases, 302 F. Supp. 244 (J.P.M.L. 1969)

Eco Swiss, Case C-126/97, [1999] ECR I-3055

Emerald Supplies Ltd & Anr v. British Airways Plc, IHC 46/09[2009]EWHC 741

Express Dairy v. IBAP, Case 130/79, [1980] E.C.R. 1887

Exxon Corp. v. Governor of Md., 437 U.S. 117 (1978)

Factortame, Case C-213/89, (1990) ECR. I-2466

Farmington Dowell Prods. Co. v. Forster Mfg. Co., 421 F.2d 61 (1st Cir. 1969)

In re Fine Paper Antitrust Litig., 98 F.R.D. 48 (E.D. Pa. 1983), modified, 751 F.2d 562 (3d Cir. 1984).

Francovich and Bonifaci v. Italy, Joined Cases C-6/ 90 and C-9/90, [1991] ECR I-5357

FTC v. Mylan Laboratories, 99 F. Supp. 2d 1 (D.D.C. 1999)

Garden Cottage Foods LTD v Milk Marketing Board,1984. A.C.130.

Georgia v. Evans, 316 U.S. 159 (1942)

Gertz v. Robert Welch, Inc., 418 U. S. 323 (1974)

Gibbs Mew v Gemmell (1998) EU LR 588, CA

GlaxoSmithKline Services Unlimited v Commission of the European Communities, T-168/01,2006

GM Fuel Tank Litig., 55 F.3d 768 (3d Cir. 1995)

Hanover Shoe, Inc. v. United Shoe Machinery Corp., 392 U.S 481 (1968)

Hans Just I/ S v Danish Ministry for Fiscal Affairs, Case 68/79, [1980] ECR 501:[1981] 2 CMLR 714

Hawaii v. Standard Oil Co., 405 U.S. 251 (1972)

Healthcare at Home v. Genzyme Limited, Case 1060/5/7/06

Illinois v. Ampress Brick Co., 536 F.2d 1163 (7th Cir. 1976)

Illinois Brick Co. v. State of Illinois 431 U.S. 720 (1977)

International Air Transportation Surcharge Litigation, M-06-01793 CRB, U.S.D.C., Northern District of California

International Shoe Machine Corp., v. United Shoe Machinery Corp., 315 F.2d 453 (1st Cir. 1963)

Iowa v. Union Asphalt & Roadoils, Inc., 281 F. Supp. 391 (S.D. Iowa 1968), aff'd, 409 F.2d 1239 (8th Cir. 1969)

Ireks-Arkady v Council and Commission, Case 238/78, [1979] ECR 2955

Just v. Danish Ministry for Fiscal Affairs, Case 68/79, [1980] E.C.R. 501

Kansas v. UtiliCorp United, Inc., 497 U.S. 199 (1990)

Kuddus v Chief Constable of Leicestershire Constabulary [2001] 2 W.L.R. 1879, HL.

Kuddus v Chief Constable of Leicestershire Constabulary [2001] UKHL 29

Kuddus v Chief Constable of Leicestershire Constabulary [2002] 2 A.C. 122

Lefrak v. Arabian Am. Oil. Co., 487 F. Supp. 808 (S.D.N.Y. 1980)

Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach, 523 U.S. 26 (1998)

Livingstone v Rawyards Coal Co (1879-80) L.R. 5 App.Cas. 25

Manfredi v. LIoyd Adriatico Assicurazioni SpA, C-295/04, 2006 ECJ1, 348

Mangano v. American Radiator and Standard Sanitary Corp. 438 F.2d 1187 (3d Cir. 1971) (per curiam)

Marks & Spencer v Commissioners for Customs&Excise,1999, S.T.C.205

Marks & Spencer v Customs & Excise, [2000] CA, CGNU [2001] VADT and GIL Insurance [2002] VADT

Martin v. Wilks, 490 U.S. 755 (1989)

Masterfoods Ltd (t/a Mars Ireland) v HB Ice Cream Ltd, Case C-344/98 : [2000] E.C.R. I-11369; [2001] 4 C.M.L.R. 14

McDonnell Douglas Corp., v. Green, 44 411 U.S. 792, 93 S. Ct. 1817, 36 L. Ed. 2d 668(1973)

In re Microsoft Corp. Antitrust Litig., 127 F. Supp. 2d 702 (D.Md. 2001)

In re Microsoft Corp. Antitrust Litig., 2001 WL 137255 (D. Md. Feb. 15, 2001)

In re Microsoft Corp. Antitrust Litig., 214 F.R.D. 371 (D.Md. 2003)

Mid Kent Holdings plc v General Utilities plc, 1996, 3 All E.R. 132

Midway Enter., Inc. v. Petroleum Mktg. Corp., 375 F. Supp. 1339(D. Md. 1974)

Mikhailidis v. Asphaliseon (IKA), Joined cases C-441/98 and 442/98, 2000 ECR I 7145

Minnesota Mining & Mfg. Co. v. New Jersey Wood Finishing Co., 381 U.S. 311(1965)

Mireco, Case 826/79, [1980] ECR 2559

Morgan Stanley Dean Witter v Visa, All ER (D) 18, May 2, 2001

Nicolo Tricarico v. Assitalia Assicurazioni, Case C-2/04, 2004

Northern . Pac. Ry. Co. v. United States, 356 U.S. 1, 4 (1958)

N. Sec. Co. v. United States, 193 U.S. 197 (1904)

Österreichischer Gewerkschaftsbund v Austria, Case C-195/98, [2000] E.C.R. I-10497

Palmisani v. INPS,Case C-261/95, [1997] ECR I-4025

Perma-Life Mufflers, Inc. v International Parts Corp., 392 US 134 (1968)

Pfizer, Inc. v. Government of India, 434 U.S. 308, 312 (1978)

In re Plumbing Fixture Cases, 298 F. Supp. 484 (J.P.M.L. 1968)

Provimi Ltd. v. Roche Prods. Ltd and others, [2003] EWHC (Comm.) 961.

The Queen v. Secretary of State for Social Security ex parte Eunice Sutton, Case 66/95, 1997 E.C.R. 1-2163

R v. Lord Chancellor ex parte Child Poverty Action Group, 1 W.L.R. 347 (Q.B. 1999) (Eng.).

Radovich v National Football League 352 U.S. 445(1957)

Regina v. Secretary of State for Transport Ex p. Factortame (No.5) [1998] 1 C.M.L.R. 1353, QBD

Reiter v. Sonotone Corp., 442 U.S. 330, 344 (1979)

Rewe-Zentralfinanz and Rewe-Zentral v. Landwirtschaftskammer für das SaarlandSteenhorst-Neerings, Case 33/76, 1993 E.C.R. 1-5475

In re Rhone-Poulenc Rorer, Inc., 51 F.3d 1293, 1298 (7th Cir. 1995)

Roache v. News Group Newspapers Ltd., 1998 E.M.L.R. 161 (C.A. 1992) (Eng.)

Rookes v Barnard [1964] A.C. 1129

Sabine von Colson and Elisabeth Kamann. v. Land Nordrhein-Westfalen, Case 14/83, [1984] ECR 1891

SA Les Fils de Jules Bianco and J. Girard Fils SA v. Directeur Général des Douanes et droits indirects, Cases 331/85, 376/85, 1988 ECR 1099

Sayers v Merck & Smith Kline Beecham plc [2001] EWCA Civ 2017

SCFC, Inc. v. Visa U.S.A., Inc, 36 F.3d 958 (10th Cir. 1994), cert. *denied, 515 U.S.* 1152 (June 19, 1995)

Scott v. Blockbuster Inc., (No. D162-535, Jefferson County, Texas, 2001)

Society of Lloyd's v John Stewart Clementson(No.2), unreported judgement of Cresswell J., May 7, 1996

Joined cases C-192/95 to C-218/95 Société Comateb, 1997 ECR I 165, CJ.

South Carolina Council of Milk Producers, Inc. v. Newton, 360 F.2d 414 (4th Cir. 1966)

Southern Gen. Builders, Inc. v. Maule Indus. Inc., 1973-1 Trade Cas. (CCH) ¶ 74,484 at 94,152 (S.D. Fla. 1972)

Standard Oil Co. v. United States, 221 U.S. 1, 60–70 (1911)

In re Sugar Antitrust Litig., 73 F.R.D. 322(E.D. Pa. 1976)

Texas Indus., Inc. v. Radcliff Materials, Inc., 451 U.S. 630, 642 (1981)

United States v. Cooper Corp., 312 U.S. 600, 614 (1941)

United States v. Grinnell Corp., 384 U.S. 563, 570–71 (1966)

United States v. Microsoft Corp., 97 F. Supp. 2d 59 (D.D.C. 2000)

United States v. Microsoft Corp., 253 F.3d 34 (D.C. Cir. 2001)

United States v. Topco Assocs., Inc., 405 U.S. 596, 610 (1972)

United States v. Visa U.S.A., Inc. 344 F.3d 229 (2d Cir. 2003)

Utah Pie Co. v. Continental Baking Co., 386 U.S. 685 (1967)

Vandervelde v. Put & Call Brokers & Dealers Ass'n, 344 F.Supp. 157, 159-60 (S.D.N.Y. 1972)

Vitamins, Commission decision of 21 November 2001, Case COMP/E-1/37.512, [2003] OJ L6/1

In re W. Liquid Asphalt Cases, 487 F.2d 191, 197-98 (9th Cir. 1973)

In re Warfarin Sodium Antitrust Litigation, 391 F.3d 516 (3d Cir. 2004)

Weber's Wine World and Others v Abgabenberufungskommission Wien, Case 147/01, [2003] ECR I-11365

West Virginia v. Chas. Pfizer & Co., 440 F.2d 1079, 1088 (2d Cir. 1971)
Williams v Settle [1960] 1 W.L.R. 1072

Official Documents

Administrative Office of the U. S. Courts, Judicial Business of the U.S. Courts 2003, Table C-2

Administrative Office of the U. S. Courts, Federal Judicial Caseload Statistics 2004, Table C-2

Administrative Office of the U. S. Courts, Federal Court Management Statistics: 2000 – 2005

Administrative Office of the U. S. Courts, Federal Judicial Caseload Statistics, Table C-2: U.S. District Courts--Civil Cases Commenced, by Basis of Jurisdiction and Nature of Suit, During 12-Month Period Ending March 31, 2002

Antitrust Modernization Commission, "Report and Recommendations", April, 2007

BAK Position Paper, "Response to Green Paper-Damages actions for breach of the EC antitrust rules", 2006

Civil Justice Council, "Reform of Collective Redress in England and Wales: A

Perspective of Need", A Research Paper for submission to the Civil Justice Council of England and Wales, 2008

Competition Commission, "First annual lecture of the National Consumer Council"(by Derek Morris, Chairman of the Competition Commission), 2002

Confederation of Finnish industries EK, "Comments on Green Paper-Damages actions for breach of the EC antitrust rules", 2006

Department of Trade and Industry and HM Treasury, "Concurrent Competition Powers in Sectoral Regulation", MAY 2006. URN 06/1244

Department of Trade and Industry, "A Prohibition Approach to Anti-Competitive Agreements and Abuse of a Dominant Position: Draft Bill", August 1997, London: DTI

Department of Trade and Industry, "A World Class Competition Regime", White Paper, The Stationery Office, July 2001

Department of Trade and Industry, "Modernisation-A consultation on the Government's proposal's for giving effect to Regulation 1/2003 and for re-alignment of the Competition Act 1998", April, 2003

ESBG, "ESBG comments on the EC White Paper on Damages actions for breach of the EC antitrust rules", Position Paper, 2008

European Commission, "Commission Notice on the cooperation between the commission and the courts of the EU member states in the application of Articles 81 and 82", OJ C 101/54, April 27 2004

European Commission, "Commission Notice — Guidelines on the effect on trade concept contained in Articles 81 and 82 of the Treaty", OJ. (C 101/81), April 27 2004

European Commission, "Commission Staff Working Paper annex to the Green Paper on Damages actions for breach of the EC antitrust rules", SEC (2005) 1732

European Commission, "Commission Staff Working Paper accompanying the White

Paper on Damages actions for breach of the EC antitrust rules", SEC (2008) 404

European Commission, "Commission Staff Working Document accompanying document to the White Paper on Damages actions for breach of the EC antitrust rules", SEC (2008) 405

European Commission, "Consumer Protection in the Internal Market"(Eurobarometer Special Report 252), QB28.5, 2006

European Commission, "Memorandum from the Commission:Consumer redress", COM (84)692, December 12, 1984

European Commission, "Frequently Asked Questions-European Commission Green Paper on Damage Actions for Breach of EC Treaty Antitrust Rule", Memo/05/489, Brussels, 2005

European Commission, "Green Paper - Damages Actions for Breach of the EC Antitrust Rules", COM (2005) 672 final

European Commission, "Guidelines on the application of Article 81(3) of the EC Treaty", OJ C 101/97, April 27 2004

European Commission, "Landmark reform simplifies and strengthens antitrust enforcement", Press Release IP/02/1739 of November 26, 2002

European Commission, "Proposal for a council regulation on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty and amending Regulations (EEC) No 1017/68,(EEC) No 2988/74, (EEC) No 4056/86 and (EEC) No 3975/87, COM(2000) 582 final, 2000

Rainer Becker, Nicolas Bessot and Eddy De Smijter, "The White Paper on damages actions for breach of the EC antitrust rules", European Commission Newsletter, ISSN 1025-2266, 2008

European Commission, "Supplementary Communication from the Commission on Consumer Redress", COM (87)210, May 7, 1987

European Commission, “White Paper on the modernisation of the rules implementing Articles 81 and 82 of the EC Treaty”, Commission Programme No 99/027

European Commission, "White Paper on Damages actions for breach of the EC antitrust rules", Com (2008) 165 final

European Council, Council Resolution on Consumer Redress, O.J. C176/2. 1987

European Parliament resolution of 26 March 2009 on the White Paper on damages actions for breach of the EC antitrust rules (2008/2154(INI))

Institute for Legal Reform, Issues-Class Action.

OECD Directorate for Financial and Enterprise Affairs Competition Committee, “Roundtable Discussion on Private Remedies: Passing on Defence; Indirect Purchaser Standing; Definition of Damages of United Kingdom”, DAF/COMP/WP3/WD(2006)10, 2006

The Office of Fair Trading, “Positive Impact – An initial evaluation of the effect of the competition enforcement work conducted by the OFT”, OFT 827, 2005

The Office of Fair Trading, “Private Actions in Competition Law: Effective Redress for Consumes and Business”, OFT916, 2007

The Office of Fair Trading, "Response to the European Commission’s Green Paper: Damages Actions for Breach of the EC antitrust Rules”, OFT 844, 2006

Romanian Competition Council,“Position of the Romanian Competition Council”(Comments on the Green Paper on Damages actions for breach of the EC antitrust rules), 2006

Senate Rep. No. 95-934, 95th Cong., 2dd Sess. 1978

U.S. Chamber of Commerce, “Chamber Celebrates Landmark Victory in Fight against Lawsuit Abuse”(Press Release), Feb. 17, 2005

The White House, "President Signs Class-Action Fairness Act of 2005"(Press Release), Feb. 18, 2005

US Department of Justice, "Competition and Monopoly: Single-Firm Conduct under Section 2 of the Sherman Act", September, 2008

Speeches

Edward D. Cavanagh, "Statement of Edward D. Cavanagh before the Antitrust Modernization Commission", 2005

John Vickers, "Chairman's foreword in the OFT ", 2003

Mario Monti, "Competition for Consumers' Benefit", Speech in European Competition Day, Speech/04/470, Amsterdam, 2004

Mario Monti, "Private Litigation as a Key complement to Public Enforcement of Competition Rules and the First Conclusions on the Implementation of the New Merger Regulation", Speech 04/403, IBA-8th Annual Competition Conference, Fiesole, 2004

Mario Monti, "Effective Private Enforcement of EC Antitrust Law" , 6th EU Competition Law and Policy Workshop, Speech/01/258, June 2001 **http://europa.eu.int/rapid/pressReleasesAction.do/reference_speech.**

Neelie Kroes, "Effective Competition Policy-a Key Tool for Delivering the Lisbon Strategy", Introductory statement at EMAC Open Meeting of Coordinators, Speech/05/73, Brussels, 3rd, February 2005

Neelie Kroes, "Competition must drive European competitiveness in a global economy", Villa d'Este Forum, Speech/05/477, Italy, 2005

Neelie Kroes, "Damages Actions for Breaches of EU Competition Rules: Realities and Potentials", Opening speech at the conference 'La reparation du prejudice cause par une pratique anti-concurentielle en France, Speech/05/613, Paris, 2005

Neelie Kroes. "Enhancing Actions for Damages for Breach of Competition Rules in Europe", Dinner Speech at the Harvard Club, Speech/05/533, New York, 2005

Neelie Kroes, "Reinforcing the fight against cartels and developing private antitrust damage actions: two tools for a more competitive Europe", Commission/IBA Joint Conference on EC Competition Policy, Speech/07/128, Brussels, 2007

Neelie Kroes, " Collective redress in Europe : Address at the panel discussion organised by DHIK at the Representation of the Free State of Bavaria to the EU", Brussels, 10th December, 2008

Philip Lowe, "Implications of the recent reforms in the antitrust enforcement in Europe for national competition authorities", Speech at Italian Competition/Consumers Day, 2003

Steven J. Miller, "Remarks Before the Antitrust Section of the American Bar Association Remedies Forum", April 2, 2003

Korean Books, Articles, Cases

Chung Ho-Yul, "Competition Law"(2nd ed.), Parkyoungsa, 2008

Gi Won-Lim, "Lecture on Civil Law"(5th ed.), Hongmunsa, 2007

Hoh Moon-Hyuck, "Civil Procedure Law", Bubmoonsa, 2006

Kim Hyung-Bae, "Lecture on Civil law", Shinjosa, 2006

Kim Hyung-Bae, "General Principles of Obligations Law", Parkyoungsa, 1999

Kwac Yun-Gik, "Law of Obligations", Parkyoungsa, 2001

Kwac Yun-Gik, "General Principles of Obligations Law", Parkyoungsa, 2005

Kwon Oh- Sung, "Competition Law"(5th ed.), Bubmoonsa, 2005

Lee Shi-Yoon, " New Civil Procedure Law", Parkyoungsa, 2005

Shin Hyun-Yun, "Competition Law"(2nd ed.), Bubmoonsa, 2007

Song Deok-Soo, "New Lecture on Civil Law"(3rd ed.), Parkyoungsa, 2010

Song Sang-Hyun & Park Ik-Hwan, "Civil Procedure Law", Parkyoungsa, 2008

Korean Articles

Hong Dae-Sik, "Damages Claim under the Korean Antitrust Law - From the perspective of practice –", 13(2) Journal of Business Administration and Law 245, 2003

Korea Fair Trade Commission (hereinafter "KFTC"), "Recent Development in Korea's Competition Laws and Policies", Principle of KFTC Policy, 2007.1.26

KFTC, "Recent Development in Korea's Competition Laws and Policies" by Chairman Kwon Oh-seung of the Korea Fair Trade Commission, 2006.5.18

KFTC, "Establishing Market Economy and Competition Policy in Korea" by Chairman Kang Chul-Kyu of the Korea Fair Trade Commission, 2004.10.29

KFTC, "Consumer Policy Development Measures of the KFTC", 2007

KFTC, "Detecting and Deterring Cartel Activity through an Effective Leniency Program", 2004 KFTC Annual Report.

KFTC, "2007 Korea Fair Trade Commission Annual Report"

KFTC, "2008 Korea Fair Trade Commission Annual Report"

KFTC, "2009 Korea Fair Trade Commission Annual Report"

KFTC, "KFTC's Case handling 2008- Statistics Report"

KFTC, "KFTC's Case handling 2009- Statistics Report"

KFTC, "Guideline for Imposition of Surcharge", 2007

KFTC, "Guideline of Anticompetitive Conduct", 2005

Kim Kil-Tae, "A Study on Enforcement Procedure in Korean Competition Law", 13(2) Journal of Business Administration and Law 175, 2003

Kim Gu-Nyeon, "A Study on Problems on Private Remedies for Damages of Korean Antitrust Law", 14 Comparative Private Law 261, 2007

Kim Young-Kab, "Damages actions of Competition Act", 30(4) Justice 66. 2003

Lee Bong-Hee, "Effective Enforcement of Competition Law", 10 Competition Law Journal 1, 2004

Lee Byung-Ju, "The Harmonization of Public and Private Enforcement: A Korean Perspective", The 5th Seoul International Competition Forum, 2008

Shin Yong Sun (Director of the KFTC), "2009 Major Project of the KFTC", Journal of Competition, 2009

Yang Kun, "Law and Society Studies in Korea: Beyond the Hahm Theses", Law & Society Review, Volume 23, Number 5, 1989

Yang Kun, "The Sociology of Law in Korea", The American Sociologist/Summer 2001.

Korean Cases

High Court 1989.10.13. 89 NA18711

High Court 1990.8.11. 90 NA25586

Supreme Court 1990.10,4. 89DaCa29075

Supreme Court 1966.10.21, 64DA1102

Supreme Court 1969.11.25, 69 DA887

Supreme Court 1975.7.27, 74DA1393

Supreme Court 1987.5.26, 86DACA1876

Supreme Court 1990.4.10, 89DACA29075

Supreme Court 1991,5,19. 90DA17422

Supreme Court 1997.4.22. 96DA54195

KFTC Decision(1987) NA726

KFTC Decision(1988) NA814

KFTC Decision(2001) DAGA